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The Continuity Principle, Administrative Constraint, and the Fourth Amendment

Harold J. Krent
IIT Chicago-Kent College of Law, hkrent@kentlaw.iit.edu

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*Harold J. Krent**

Critics have lamented the amoebic quality of Fourth Amendment jurisprudence. A test of general reasonableness proves to be almost no test at all. In an era in which fighting against terrorism has garnered the national limelight, all but the most intrusive law enforcement measures seem reasonable when measured against the less palpable assertions of privacy by individuals suspected of terrorism and criminal wrongdoing more generally. Law enforcement authorities can look through trash,[1] screen travelers at transportation hubs,[2] demand that suspects identify themselves,[3] stop motorists for pre-textual reasons[4] and so forth. Indeed, the more that law enforcement authorities are allowed to search, the less reasonable expectations of privacy can become: we as a society become inured to the whittling away of individual privacy. Given the growing acceptance of screening, checkpoints, and databases, courts largely have sided with law enforcement authorities in their continuing war on crime.

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* Dean and Professor, Chicago-Kent College of Law. I would like to thank Kathy Baker, Tracey Maclin, and Mike Pardo for their comments on earlier drafts, and thank Elizabeth Sietsema for her research assistance.

1 California v. Greenwood, 486 U.S. 35 (1988).

2 Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (using the example of airline passenger searches to illustrate that, when the risk of harm is substantial, the government is justified in making reasonable searches); United States v. Edwards, 498 F.2d 496, 498 (2d Cir. 1974) (finding a warrantless search of luggage in an airport reasonable, particularly because defendant had fair warning of the search).

3 Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177 (2004).

4 Whren v. United States, 517 U.S. 806 (1996).

Fourth Amendment doctrine need not be so gelatinous. Courts and commentators have overlooked at least one secondary standard that lies just beneath the surface in a wide spectrum of Fourth Amendment cases. Simply put, law enforcement authorities, with limited exceptions, must end searches and seizures once the objectives that justified the searches and seizures have been completed. Although this tenet, which I term the "continuity principle," does not affect our understanding of what constitutes a search or seizure, it can serve a vital role in confining the searches and seizures that take place.

The Warrant Clause embraces this principle of continuity, requiring that law enforcement authorities must articulate the purpose and ends of any search and any seizure before proceeding. The Clause thereby creates a record upon which courts after the fact can determine the legality of a challenged search. A record requirement also prompts each law enforcement official to deliberate a little longer and more carefully before conducting a search or seizure. The Framers wished to curb the abuses of the general warrants and writs of assistance utilized in colonial times.[5] When warrants are not practicable, adhering to the continuity requirement is even more important due to the absence of both a record and ex ante oversight by a neutral judicial official. Ex post enforcement of the continuity requirement is one of the only means—in the absence of a warrant—to circumscribe the discretion of law enforcement officials.

Indeed, in three cases this past term, the Supreme Court wrestled with Fourth Amendment cases implicating the continuity principle, but in none of the cases did the Court fully explore its relevance. In *Illinois v. Caballes*[6] the Court decided that a dog sniff of a stopped car did not constitute a search and yet ignored the increased length of the motorist's seizure necessitated by the dog sniff. The Court, in other words, did not demand that the seizure of the motorist end when the justification—investigating and/or ticketing the speeding—ceased.

5 For a discussion of the differences between general warrants and writs of assistance, see Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 BROOK. L. REV. 1385, 1390–91 n.16 (1994) (noting that writs allowed officers more discretion than general warrants because they were not limited to an instance of wrongdoing; also, while general warrants expired after execution, the authority of the writs remained good for the life of the reigning sovereign).

For a more detailed discussion of writs of assistance and general warrants, see JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19–45 (1966); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51–78 (1937) ("The writ empowered the officer and his deputies and servants to search, at their will, wherever they suspect uncustomed goods to be.").

6 125 S. Ct. 834 (2005).

Similarly, in *Muehler v. Mena*[7] the Court overturned a jury verdict awarded against police officers who had detained the plaintiff, placed her in handcuffs, and intermittently interrogated her for over two hours while the officers searched the premises. In so doing, the Court declined to rule on the plaintiff's argument in the trial court that the officers extended her detention even beyond the time needed to conduct the search.[8] In *Devenpeck v. Alford*[9] the Court held that a civil suit for an unconstitutional arrest should be dismissed when law enforcement authorities had a legitimate reason to arrest a motorist even though the justification proffered at the time was not valid. The Court did not demand that the law enforcement authorities stick to the original justification for the arrest.

In this Article, I explore the historical, doctrinal, and normative underpinnings of the continuity principle, addressing how this fundamental tenet is of critical importance in limiting the discretion of law enforcement officials under the Fourth Amendment. After a brief historical survey, Part I examines continuity in the well established context of searches effected through warrants. It then shows how that same principle applies in warrantless searches as well. The Supreme Court has in fact recognized in many cases that searches become unreasonable when authorities stray from the objectives underlying the search, but it has not adorned its decisions with much justification. Perhaps it should not be surprising, therefore, that lower courts have declined to enforce the principle rigorously. Yet, stringent application is necessary to prevent enforcement officials from routinely expanding searches to fish for evidence of criminal conduct unrelated to the reasons justifying the original intrusion into privacy. Rigorous adherence to the continuity principle also deters enforcement officials from initiating searches on the mere hap that incriminating information can be obtained that is not connected to the reasons legitimating the searches.

Part I next argues that the continuity principle should apply in seizure as well as in search cases. Warrants at times are required for arrests, and the scope of all seizures must be circumscribed by the purpose for which the seizure was made. Accordingly, prolonging the duration of a seizure to investigate unrelated crimes or for any other reason breaches the continuity principle and thus violates the Fourth Amendment.

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7 125 S. Ct. 1465 (2005).

8 *Id.* at 1472.

9 125 S. Ct. 588 (2004).

In Part II, I then analyze *Caballes*, *Muehler*, and *Alford* from the perspective of the continuity principle. *Caballes* should have called for a relatively straightforward application of the continuity principle, for the seizure was prolonged in order to conduct a criminal background check and a dog sniff to investigate conduct unrelated to that justifying the routine traffic stop. Curtailing the duration of the seizure is critical to preventing abuse by law enforcement officials. Instead, the Court brushed aside the continuity issue, focusing on and rejecting the defendant's principal claim that the dog sniff constituted a distinct search within the meaning of the Fourth Amendment. *Muehler* similarly raises the question whether detention must immediately cease after the underlying objective that legitimated the detention is satisfied. Although the Court declined to reach the issue, ruling instead that the questioning and handcuffing by themselves did not violate the Fourth Amendment, the case readily could have been resolved on the basis that the detention was unreasonably prolonged. On the other hand, I agree with the Court's conclusion in *Alford* that law enforcement authorities should not be liable for an unlawful arrest when a legitimate justification exists that should have been apparent to a reasonable officer. The potential for administrative abuse in such cases is marginal.

I conclude with more general thoughts on recognizing administrative constraints on law enforcement officials. Understanding the continuity principle is a critical first step, but consideration of the potential for overreaching by law enforcement officials has greater import. When warrants are not required, law enforcement officials should be circumscribed by constraints similar to those underlying the Warrant Clause. Three interrelated facets of the encounter in particular should be considered. First, the more that individual enforcement officials exercise discretion, the greater the potential deleterious impact on privacy. Second, when many individuals are subject to comparable searches and seizures, there is less likelihood that individual privacy will suffer because no one individual or small group has been singled out for disadvantageous treatment. Finally, the more that the search or seizure stems not from the exercise of discretion by law enforcement officials but rather from considered departmental policy, the greater the likelihood that the search has been checked by the political process and should be considered reasonable. These factors should help flesh out the contours of reasonableness under the Fourth Amendment.

I. THE CONTINUITY PRINCIPLE

A. *History of the Warrant Clause*

The Founders were well aware of the risk of government overreaching in law enforcement investigations. Time and again, officers of the Crown in the colonial era engaged in broad ranging searches and seizures. Pursuant to the writs of assistance and, on occasion, general warrants, authorities could rifle through the contents of an individual's home and use any information discovered in a subsequent proceeding, irrespective of whether they expanded the search to pursue a new objective. Once in a house, in other words, everything was fair game. And, law enforcement officials could decide whether to arrest suspects without any oversight.

The historical events are not in controversy. Historians generally have pointed to three episodes that highlighted the need for restraining law enforcement officials. Even a cursory examination of the history points to the important protection afforded by specific warrants. Warrants may not have been needed in all contexts, and that is where much of the historical argument lies,[10] but when required for searches of homes, the imperative of specificity was clear.

First, in the Massachusetts Bay Colony, customs officials during the mid-eighteenth century used general writs of assistance to search for imported goods on which no tax had been paid.[11] Great Britain

10 *See* LANDYNSKI, *supra* note 5; LASSON, *supra* note 5; Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 930–58 (1997); William J. Cuddihy, The Fourth Amendment 1602–1791: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with Kresge Law Library, Notre Dame Law School). For exceptions, see TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS (1969); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995). These authors recognize the salience of the historical examples but argue that the history led the Framers to eschew any reliance on warrants whatsoever. In their view, the Framers, for a variety of reasons, frowned upon all use of warrants. For an attack on their understanding of history, see Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707 (1996); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

11 Even before the *Writs of Assistance Case*, controversy over enforcement of customs laws arose. As Cuddihy relates, some customs officials in Salem "forced their way into numerous houses, warehouses, and ships and seized vast quantities of weapons, rum and molasses, much of which was not contraband liable to confiscation. [The chief officer]'s behavior must have caused resentment, for his heavily armed crew had threatened to shoot several citizens." Cuddihy, *supra* note 10, at 726.

enlisted the colonies in its effort to gain commercial dominance. The target was molasses, imported from the non-British West Indies, which was a key to the rum trade. No resort to a judicial official was required to search for the molasses even in private houses. Although enforcement of the tax had been lax, several merchants reacted to efforts to search their premises with violence. On behalf of the merchants, James Otis argued in the 1761 *Writs of Assistance Case* that the common law prevented such general writs. He stressed that the writs granted "a power that places the liberty of every man in the hands of every petty officer."[12] Indeed, customs officers "may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient."[13] Much of the protest centered on the excessive discretion vested in low level law enforcement officials. After some delay on the part of the provincial court, Otis lost the case, but the memory of the alleged injustices continued to rankle. The Massachusetts colonial legislature soon thereafter imposed far more stringent requirements on the writs, limiting their duration.[14]

Second, a more notorious set of cases arose amidst a political controversy in England. John Wilkes in an anonymous pamphlet had described the British Tory administration as "wretched puppets" and "the tools of corruption and despotism."[15] Pursuant to general warrants, government officials were empowered to ascertain who had published the pamphlet and to arrest those responsible. The warrant directed officials "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, intitled [sic], The North Briton, No. 45 . . . and them, or any of them, having found, to apprehend and seize, together with their papers."[16] The general warrant prompted officers to search the homes of at least five suspected political opponents and led to the arrest of forty-nine individuals.[17] Authorities roused one suspect out of bed in the middle of the night.[18] Wilkes, a leading member of Parliament, was later seized

12 M. H. SMITH, THE WRITS OF ASSISTANCE CASE 342 (1978).

13 *Id.*

14 LASSON, *supra* note 5, at 65–66.

15 Cuddihy, *supra* note 10, at 886 (internal quotation marks omitted).

16 The King v. Wilkes, (1763) 95 Eng. Rep. 737, 737 (K.B.), *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS 981, 981 (T.B. Howell ed., London, T.C. Hansard 1813) [hereinafter COLLECTION OF STATE TRIALS].

17 Cuddihy, *supra* note 10, at 893.

18 LASSON, *supra* note 5, at 44.

when two of those arrested implicated him, and his papers were carted off, including his will.[19] Authorities released Wilkes shortly after due to parliamentary privilege.[20]

In turn, Wilkes sued the officials contending that the general warrants were invalid at common law. A jury agreed, and awarded Wilkes substantial trespass damages. Wilkes then also sued the Secretary of State who had issued the warrant, and won again. The cases were much celebrated by the press in both England and the colonies.

Finally, Parliament reauthorized use of the general writ for customs searches in the Townshend Act of 1767.[21] Frustrated by the circumvention of the Navigation Acts, British authorities hoped that the new Act would permit much more effective enforcement of the customs laws. An influential citizen, generally thought to be Samuel Adams, protested that "our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered by wretches . . . whenever they are pleased to say they suspect there are in the house wares, etc., for which the dutys [sic] have not been paid."[22] The focus again was in part on the broad leeway enjoyed by the law enforcement officials.[23] Despite the statutory authorization, many colonial judges denied officials' requests for general writs, influenced in part by the *Wilkes* precedents. Judge William Henry Drayton of Charleston, for instance, later complained in 1774 that "a petty officer has power to cause the doors and locks of any man to be broke open, to enter his most private cabinet, and thence to take and carry away, whatever he shall in his pleasure deem uncustomed goods."[24]

The lack of specificity in general warrants and writs led to a number of abuses, including broad searches of homes, the indiscriminate seizure of personal papers, and the arrest of suspects without any prior check as to the level of proof demonstrated. Merchants shuddered at the thought of officials rummaging through their houses and personal effects—the specter of lower class individuals wandering

19 *Id.*

20 *Wilkes*, 95 Eng. Rep. at 737, *reprinted in* COLLECTION OF STATE TRIALS, *supra* note 16, at 981.

21 LASSON, *supra* note 5, at 71.

22 Cited and discussed in Davies, *supra* note 10, at 602 n.139.

23 When authorities at dusk seized John Hancock's sloop *Liberty* for carrying contraband, a riot resulted, in part evidently because of the belief that any such seizures could only be made in the day. LASSON, *supra* note 5, at 72 n.71.

24 Davies, *supra* note 10, at 582 n.83.

through their homes was difficult to bear.[25] The First Continental Congress's list of colonial grievances against the British Parliament in 1774 included general writs.[26]

To prevent such recurrences,[27] the Framers could have pursued any number of approaches. For instance, they could have relied on operation of the tort system, familiar to them from precedent in England, as some academics have argued.[28] The threat of civil suits deters unconstitutional action by raising the prospect of individual officer liability. Officers may steer clear of unconstitutional searches and seizures for fear of incurring liability. Tort suits against officials were recognized as a primary means of deterring government abuses.[29]

Alternatively, they could have established monetary penalties against the government itself, encouraging better monitoring and training of individual officers, and deterring individual officers from conduct that would subject their governmental employer to liability. Incidence of enterprise liability, however, was extremely rare in the era of the framing.[30] Another option lay in the now familiar exclusionary rule. Evidence obtained through unconstitutional searches and seizures cannot generally be used in prosecutions. Individual officers would think twice about an illegal search for fear of later compromising an important prosecution. Excluding illegally obtained evidence at trial did not emerge as a remedy, however, until the late

25 *Id.* at 577–78 (relating that the Framers "expressed outright disdain for the character and judgment of ordinary officers. Indeed, the Framers' perception of the untrustworthiness of the ordinary officer was reinforced by class-consciousness and status concerns" (citation omitted)).

26 *Id.* at 567.

27 Abuses continued with searches of suspected Loyalists' houses during the Revolutionary War period. Once in authority, the former Revolutionaries did not hesitate to deploy wide-ranging searches to further their hold on power. As Cuddihy relates, "Charles Wilson Peale, the famous portrait painter, and Matthew Irwin led teams of soldiers that invaded houses throughout Philadelphia. The troops broke desks, burst locks even when their owners were too ill to rise from their sick beds, and confiscated books, personal papers and official records indiscriminately." Cuddihy, *supra* note 10, at 1270. The Framers may not have fully repressed this memory in drafting the Fourth Amendment.

28 Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 62 (1996).

29 *Id.*

30 Currently, enterprise liability is a familiar feature of our system. For example, Congress in the Federal Tort Claims Act has waived the government's immunity from suit for some unconstitutional actions taken by its employees, including unlawful searches and seizures. 28 U.S.C. § 2679(a) (2000).

nineteenth century.[31] Or, the Framers could have hoped that their new government would train and supervise law enforcement officials better than had the Crown.

B. Function of the Warrant Clause

Instead, the Fourth Amendment provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[32]

The relationship between the two clauses has bedeviled commentators.[33] This article presupposes that the "Reasonableness" Clause should be read as a gloss on the Warrant Clause—in other words, that the Warrant Clause occupies the pivotal position in the Fourth Amendment. Reasonableness is to be assessed at least in part by considering whether protections similar to those underlying the warrant mechanism are present. Warrants or warrant-type protections are preferred whenever possible. And, so most academics have concluded when considering the history related before.[34] Indeed, the Supreme Court asserted in *Warden v. Hayden*[35] that the Fourth Amendment "was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the colonies, and was intended to protect against invasions of the sanctity of a man's home and the privacies of life."[36]

Requirement of a specific warrant therefore is the critical step taken by the Framers to protect personal privacy. First, prior to undertaking a search, officials must have probable cause to undertake any search or seizure. Second, they must present the information assembled to a neutral magistrate for review, linking that probable cause to individuals specified, premises to be searched, and items to be seized. That oversight limits the potential for overreaching.

There is a third and related aspect to the Clause that has been comparatively overlooked. The Clause requires officials to create a record upon which their subsequent acts can be assessed. Forcing law enforcement officials to create a record tempers spur-of-the-moment

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31 Boyd v. United States, 116 U.S. 616, 638 (1886).

32 U.S. CONST. amend. IV.

33 *See, e.g., supra* note 10.

34 Cuddihy, *supra* note 10; Davies, *supra* note 10; Maclin, *supra* note 10.

35 387 U.S. 294 (1967)

36 *Id.* at 307.

decisions and acts as a conservative force to limit hasty or ill-thought out searches. At the margins, there likely will be less extensive searches and seizures because of the need to draft an application and due to the knowledge that the application will be reviewed by a neutral magistrate.[37] To a generation that feared the discretion of peace officers,[38] the check on haste served a critical protection. The latter two aspects of the Warrant Clause in particular—review by a neutral magistrate and the requirement of a record—work together to limit the potential for abuse. Privacy—at least in the home—is too important to leave to the frail protection afforded by after-the-fact balancing under which authorities could largely justify their intrusion based on whatever evidence they uncovered. Civil suits might well provide insufficient protections from excessive government searches, particularly because of the difficulty in proving and pricing the violations. As a result, the threat of suit would insufficiently deter law enforcement officials from arbitrary or excessive searches and seizures. Law enforcement officials must instead defend their actions based on what was articulated *before* the search.

A warrant requirement is not without its costs. Before every search takes place, a law enforcement official and a neutral magistrate must spend time scrutinizing the objectives and the link between the objectives and items to be searched. The resources demanded are considerable. In a system that is regulated instead by tort or exclusionary rules, only a fraction of the searches will ever be challenged because the vast majority of searches either cause no harm or are clearly constitutional.[39] The Framers' decision to require ex ante review in each case reflects their commitment not to relegate protection for privacy to after-the-fact mechanisms, even though such mechanisms—whether tort challenges or the exclusionary rule—allow far greater adversarial process than the ex parte application for a warrant.

The Warrant Clause therefore commits authorities today to limits before authorizing a search. Applying for warrants forces authorities to specify the reason for the search and describe in detail the objects to be seized. If the objective after the fact turns out to be unlawful, the fruits of the search can be suppressed, and the officers subject to

37 Other mechanisms could have generated this advantage, such as an approval by a prosecutor or even a higher up within the department. *See* William J. Stuntz, *Articles and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 892 (1991). Warrants for electronic eavesdropping operate in this fashion by requiring approval of law enforcement officials in Washington. *See* 18 U.S.C. § 2516 (2000).

38 Davies, *supra* note 10, at 577–78; *see also* Maclin, *supra* note 10.

39 Stuntz, *supra* note 37, at 887–88. Moreover, damages from unlawful searches may be difficult to quantify, even though Wilkes was successful.

suit under the Fourth Amendment. Moreover, if the objects seized differ from those in the earlier recitation, then they too can be suppressed as the result of an unlawful search. The need to create a record prior to the search has long been recognized. A list of both the objectives and the items to be searched provides a standard under which courts after the fact can assess the reasonableness of law enforcement authorities' actions. Indeed, the Supreme Court recently rejected the qualified immunity defense of an officer who conducted a search based on a warrant that failed to particularize the items sought: "This warrant did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items. . . . Rather . . . the warrant did not describe the items to be seized *at all*."[40] Indeed, "unless the particular items described in the affidavit are also set forth in the warrant itself . . . there can be no written assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit."[41]

Other areas of law feature record requirements as well. Considering how the record requirement operates in those areas reinforces the importance of the record in the search and seizure context. In administrative law, the *Chenery* doctrine[42] serves a function similar to a warrant. The validity of any agency's exercise of discretion—as opposed to its interpretation of law—typically turns on the rationale used by the agency at the time of its action. The Supreme Court has held that discretionary administrative action will only be upheld on grounds articulated by the agency in the record. The *Chenery* doctrine in part limits agency power to make policy outside of public scrutiny.

In *Chenery*, the SEC conditioned its approval of a public utility holding company's reorganization on the officers' willingness to disgorge shares of preferred stock they had purchased during the reorganization period. The SEC had not found any wrongdoing but based its demand upon court cases exploring the common law duty of fiduciaries. The Supreme Court vacated the SEC's decision, holding that the administrative agency had misread judicial precedents.[43] The Court refused to speculate whether any other reasons justified the agency's conclusion: "The grounds upon which an administrative order must be judged are those upon which the record discloses that its

40 Groh v. Ramirez, 540 U.S. 551, 558 (2004).

41 *Id.* at 560.

42 *See* SEC v. Chenery Corp. (*Chenery I*), 318 U.S. 80 (1943).

43 *Id.* at 89.

action was based."[44] Accordingly, a court must assess agency action based on the rationales forwarded by the agency itself at the time of its decision: "Courts may not accept appellate counsel's *post hoc* rationalizations for agency action."[45]

Reviewing courts therefore will only allow agencies to defend their actions on the basis of reasons articulated prior to judicial review. As conditions or personnel change, agencies cannot substitute a different rationale without reopening proceedings. If agencies reopen the proceedings, then they must subject their new reasoning to challenge by interested parties in either a rulemaking proceeding or an adjudication. Efficiency may be lost, but at the gain of greater protection for the regulated public—policy can emerge more slowly. The *Chenery* doctrine therefore is akin to the warrant requirement in forcing agencies to deliberate more before acting and to precommit to particular rationales for agency action.[46]

The required precommitment by law enforcement authorities protects citizens from expanded searches. For instance, consider a prototypical Fourth Amendment case in which law enforcement authorities wish to search a suspect's apartment for stolen machine guns. Before a warrant will issue, the authorities must describe the apartment, detail why they have probable cause to link the apartment to

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44 *Id.* at 87. In reviewing the SEC's action after remand, the Court later explained that

> a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 196 (1947).

45 Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). Post hoc rationalizations, therefore, are not generally considered. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Deukmejian v. Nuclear Regulatory Comm'n, 751 F.2d 1287 (D.C. Cir. 1984). A rationale articulated by agency counsel in litigation may not reflect the agency's view, may have been hastily developed with an eye only toward prevailing in the litigation, and may not have been subject to the input of parties in either a rulemaking or adjudication. *Cf.* FLRA v. U.S. Dep't of Treasury, 884 F.2d 1446, 1455 (D.C. Cir. 1989) ("[A] position established only in litigation may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views.").

46 Other examples exist in which governmental entities must, prior to acting, create a type of record. Such instances range from preclearance for changes under the Voting Rights Act, 42 U.S.C. § 1973(c) (2000), to required notice and a limited hearing before cutting off benefit entitlements, *see* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

the stolen machine guns, and then describe the guns with some detail. If the authorities, armed with a warrant, then search the apartment and seize counterfeit Hermès scarves from a desk drawer, the fruits of the search almost assuredly will be suppressed. Unless the authorities had some reason to stumble upon the scarves in the midst of searching for the machine guns, they cannot use the scarves to launch a new investigation of the defendant. Indeed, the defendant may be able to sue the officers under the Fourth Amendment, claiming that the seizure of the scarves, given that it was not supported by any cause whatsoever, violated the suspect's right to be secure in his or her effects.

The continuity requirement is vital to constrain the discretion of law enforcement officials. In the absence of the requirement, officials could have testified after the search that they had intended at the outset to look for counterfeit scarves. They could have constructed reasons why probable cause existed to believe that the defendant dealt in counterfeit goods, and the presence of the scarves would itself be testament to the probity of their suspicions. Moreover, without the prior writing, there would be less information against which to assess the authorities' testimony. Of course, the officers can still lie about where they found the scarves, but the requirement of ex ante writing limits the potential for abuse.

C. Supreme Court Doctrine Recognizing the Continuity Principle

Law enforcement authorities today, however, rely much less frequently upon warrants than in years past. In the last forty years, the Supreme Court has permitted warrantless searches and seizures in a wide variety of contexts. In the absence of warrants, the continuity requirement becomes more difficult to enforce even as it becomes more important to recognize.

The critical case revamping the constitutional terrain is *Terry v. Ohio*.[47] In *Terry*, the Supreme Court recognized the legitimacy of brief, warrantless seizures carried out by law enforcement authorities to investigate suspicious activity. In doing so, the Court emphasized the need to remain faithful to the principles girding the warrant requirement. The *Terry* Court stressed that "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant."[48]

In setting a structure to constrain law enforcement officials, the Court in *Terry* provided that a seizure "must be 'strictly tied to and

47 392 U.S. 1 (1968).

48 *Id.* at 20.

justified by' the circumstances which rendered its initiation permissible,"[49] and "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[50] The Court in *Terry* in effect applied the principle of continuity that underlies the warrant requirement to ensure that such stops were confined to the legitimating objectives. Moreover, the Court explained that "[t]he Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation."[51] *Terry* therefore starkly rejects any notion of using such stops to launch fishing expeditions. Rather, the seizure must be "reasonably related in scope to the justification" for the seizure's initiation.[52]

1. Limitation on Searches

Although not conceptualized as such, the Supreme Court has struck down a variety of searches in which the continuity principle was breached. In *Arizona v. Hicks*,[53] when police officers entered an apartment in response to a shooting, one of the officers noticed some expensive stereo equipment.[54] The officer suspected that the equipment was stolen and moved the stereos a few inches to read the serial numbers.[55] The Court held that, although exigent circumstances permitted the officers to enter the apartment—obviating the need for a warrant—by moving the stereos to read the serial numbers, the officer conducted a new search that was unrelated to the objectives of the authorized intrusion.[56] Despite the fact that the officers were already lawfully in the apartment and that the stereos were in plain view, the intrusion was "unjustified by the exigent circumstances that validated the entry."[57] In a memorable turn of phrase, the Court summarized that "[a] search is a search, even if it happens to disclose nothing but the bottom of a turntable."[58] Reasonableness under the Fourth Amendment requires that searches be justified by reference to

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49 Florida v. Royer, 460 U.S. 491, 500 (1983) (quoting *Terry*, 392 U.S. at 19).

50 *Id.*

51 *Terry*, 392 U.S. at 28–29.

52 *Id.* at 29. The Supreme Court in *Caballes* apparently read the scope limitations out of the *Terry* test. *See* Illinois v. Caballes, 125 S. Ct. 834, 834 (2005).

53 480 U.S. 321 (1987).

54 *Id.* at 323.

55 *Id.*

56 *Id.* at 324–25.

57 *Id.* at 325.

58 *Id*; *see also* United States v. Jacobs, 986 F.2d 1231 (8th Cir. 1993) (holding that the authorities violated the Fourth Amendment when they continued searching a

the rationales that legitimated them—any expansion not justified by the plain view doctrine[59] had to be independently justified under the Fourth Amendment.

On the one hand, the result in *Hicks* may strike many as silly. If the stereo equipment had been lying on its side, then the numbers would have been in plain view. Moreover, once the enforcement officials were lawfully in the apartment, the suspect enjoyed only marginal additional privacy interest in being secure from the officers' additional intrusion in flipping over the turntable. Turning over the turntable to record the serial numbers seems reasonable in light of the limited privacy interest at stake. Yet, if the Fourth Amendment is viewed in part as a restraint on enforcement officials' overreaching, as the history suggests, the result in *Hicks* is much more understandable. Law enforcement officials should not have the incentive to parlay one search into another, nor the incentive to obtain justification for one search so as to permit an extended or second search for a different purpose. The continuity principle in the Warrant Clause reflects the long-held belief that privacy is protected by blunting law enforcement officials' incentive to conduct wide-ranging searches untethered to objectives justifying the initial search. As Justice Stevens commented in *Texas v. Brown*,[60] the Court "has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will."[61]

The Court applied the continuity principle articulated in *Hicks* to limit a search in *Minnesota v. Dickerson*.[62] There, an individual leaving a building that law enforcement officers considered a notorious crack house changed directions and walked away from the officers once he saw them. The officers made an investigatory *Terry* stop—not needing a warrant—and conducted a brief frisk for weapons. Although the examining officer did not find any weapons, he did feel in a jacket pocket what turned out to be a package of cocaine, which he seized.[63] The Supreme Court held that, although the officer was justified in

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package even though a drug sniffing dog failed to alert on the package, hence negating the arguable probable cause that existed previously for the search).

59 *See* Michigan v. Tyler, 436 U.S. 499, 509 (1978).

60 460 U.S. 730 (1983).

61 *Id.* at 748 (Stevens, J., concurring). The Court permitted law enforcement authorities in that case to seize from a motorist a balloon that was in plain view when they had reason to connect the balloon to the drug trade. *Id.* at 739–40 (majority opinion).

62 508 U.S. 366, 371 (1993).

63 *Id.* at 369.

conducting the brief frisk for weapons, "the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was *unrelated* to '[t]he sole justification of the search.'"[64] According to the Court, *Terry* stops must be "strictly 'limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.'"[65] Because the search and ultimate seizure were unrelated to the original stop, the Court held that the seizure was unconstitutional.[66]

As with the search in *Hicks*, it may seem a small step from a legitimate pat for weapons to investigate an object that, though not a weapon, was suspicious. A short examination of that object may appear to be reasonable. But, viewed through the prism of administrative restraint, the continued exploration of the jacket pocket's contents exceeded the scope of the search that had been justified by the original frisk for weapons. In the absence of such limit, enforcement authorities could transform a limited *Terry* search into a full-fledged search of an individual, and that would afford authorities too much discretionary authority, as in the days of general warrants or writs of assistance.[67]

Even when law enforcement authorities can enter homes or offices to arrest individuals, they cannot then switch objectives once there to search the premises. Law enforcement authorities must stick to the objective justifying their presence in the home or office. In *Chimel v. California*,[68] in demarcating the doctrine of searches incident to arrest, the Court noted that "simply because some interference with an individual's privacy and freedom of movement has lawfully taken place [is no reason why] further intrusion should automatically be allowed despite the absence of a warrant that the Fourth Amendment

64 *Id* at 378 (emphasis added) (citations omitted).

65 *Id.* at 373 (quoting Terry v. Ohio, 392 U.S. 1, 26 (1968)).

66 *Id.* at 378–79.

67 Similarly, in *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978), the Court held that the legitimacy of law enforcement authorities' presence in an apartment did not permit a wider search for evidence. An undercover police officer entered an apartment to conclude a drug sale and was shot. Backup quickly entered, subdued individuals in the apartment, and then called for help. Homicide detectives arrived ten minutes later and proceeded to gather evidence over the next four days, searching the entire apartment and inventorying all of the contents. *Id.* at 387–89. Although the officers' initial presence in the apartment was legitimate, the Court ruled that the subsequent search was not. *Id.* at 392–93. The extended search could only have been justified with a new warrant: "And a four-day search that included opening dresser drawers and ripping up carpets can hardly be rationalized in terms of the legitimate concerns that justify an emergency search." *Id.* at 393.

68 395 U.S. 752 (1969).

would otherwise require."[69] And, in *Maryland v. Buie*[70] the Court held that a protective sweep after an in-home arrest did not justify any additional search—"once [the suspect] was found, however, the search for him was over, and there was no longer that particular justification for entering any room that had not yet been searched."[71] Searches incident to arrest must therefore be circumscribed to prevent a general search of the premises.[72]

This is not to suggest that the history leading up to ratification of the Fourth Amendment convincingly demonstrates that law enforcement authorities must today be held to the objectives that justified bypassing the warrant requirement.[73] The Amendment, after all, was crafted in an era when there was no police force, little organized crime, and technology meant something very different. Thus, it would be impossible to apply the Framers' design exactly as they would have intended today given the very different social reality within which we live. Nonetheless, the underlying concern for cabining the authority of low-level enforcement officials should be as salient today as it was in the time of the Framing. Indeed, the continuity requirement is even more important given the many exceptions to the warrant requirement that the Supreme Court has recognized.

In short, the Court has recognized the principle of continuity in a variety of search settings even if it has not persuasively justified its holdings with reference to the Fourth Amendment history or contemporary policy concerns. Searches and any expansion must be legitimated by reference to the objectives underlying the original search. When warrants are not applicable, the legitimacy of searches must be assessed by the rationales justifying the warrantless search. As the Court summarized in *Horton v. California*,[74] "a warrantless search [must] be circumscribed by the exigencies which justify its initiation."[75]

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69 *Id.* at 767 n.12. The Court has expanded the search incident to arrest exception, but not obliterated it. *See* Thornton v. United States, 541 U.S. 615 (2004); New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973).

70 494 U.S. 325 (1990).

71 *Id.* at 333.

72 United States v. Lefkowitz, 285 U.S. 452 (1932); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (holding that search incident to arrest did not justify search of entire residence).

73 The historical evidence is not without ambiguity. Evidently, searches incident to arrest were widely accepted even while searches without a warrant into the home were strictly prohibited. *See* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381 (2001).

74 496 U.S. 128 (1990).

75 *Id.* at 139–40.

Lower courts, however, have not always been hospitable to this line of cases. While paying lip service to *Hicks* and *Dickerson*, a number of courts have adopted such relaxed standards as to sap the continuity principle of much of its vitality. For instance, in *People v. Custer*[76] law enforcement authorities arrested an individual for possessing marijuana and then proceeded to pat down his companion, Custer, to ensure their safety.[77] The investigating officer removed what he thought from the pat down search to be blotter acid from Custer's pocket and set it on the roof of the car. The officer found no weapons. When he later picked up the object, he saw that they were photographs, turned them over, and noted what appeared to be marijuana plants in the pictures.[78] The information contained in the pictures led to incriminating evidence. The Michigan Supreme Court upheld the search of the pocket's contents first on the theory that the officer had probable cause to believe that the cardboard-type substance was contraband.[79] Quite a stretch. It is difficult to believe that an officer patting down an individual's pants could, by feel, determine that an object was blotter paper as opposed to, say, a piece of cardboard. And, there was no reason to link Custer to acid at all. Then, the court held that the officer had justification to turn over the photos after he realized his mistake on the ground that Custer had a diminished expectation of privacy in the photos once they had lawfully been seized by the officer.[80] That reasoning is nonsense. If an officer picked up a diary and realized it had no relevance to the ongoing investigation, he or she could not then leaf through its contents; nor should the seizure of a video authorize enforcement officials to view it once they realize that the video is irrelevant to the investigation. The same should be true with the back of a photograph.

Custer is not an aberration. In *State v. Wonders*[81] the Kansas Supreme Court upheld a search in which a car had been stopped for failing to use a turn indicator. The officer asked the passengers to exit the car, and the subsequent search of the car revealed drug paraphernalia. The officer next decided to pat down the passengers and, although he did not find any weapons, he testified that, from the "feel" of a bulge in a pant's pocket, he had probable cause to identify the bulge as marijuana.[82] During the suppression motion, the officer

76 630 N.W.2d 870 (Mich. 2001).
77 *Id.* at 874.
78 *Id.*
79 *Id.* at 878–79.
80 *Id.* at 881–82.
81 952 P.2d 1351 (Kan. 1998).
82 *Id.* at 1354–55.

testified that baggies of marijuana had a consistent feel to them that he could not put into words.[83] The Court credited the trial court's determination that the officer had sufficient reason to believe that the bulge was marijuana. And, in *State v. Craven*[84] the suspect had been riding a motorcycle without a helmet, and his cycle had no license plate. The officers conducted a pat down search, even though they had no reason to think the driver posed a danger, other than perhaps to himself for failing to wear the helmet. The investigating officer alighted upon something metallic that he asserted felt like a marijuana pipe, which is illegal to possess under Nebraska law.[85] The item turned out to be a spark plug, but the officer discovered some crack cocaine in the process of pulling the spark plug out of the motorcyclist's pocket.[86] The Nebraska Supreme Court concluded that the officer had probable cause to believe that the item was in fact a marijuana pipe.[87]

Squaring these lower court cases with *Dickerson* and *Hicks* is almost impossible. Only by dint of heroic faith in a police officer's abilities can one assume that the pat down of pants in *Wonders* could be so discerning, and the proffered rationale justifying examination of the photographs in *Custer* is ludicrous. The reluctance to follow the relevant Supreme Court precedent may stem from antipathy toward the exclusionary rule. These courts would not be the first to skew facts to prevent obviously guilty defendants from going free. But, the reluctance might also arise from the Supreme Court's seeming arbitrary linedrawing. The courts may not have perceived the continuity principle underlying *Hicks* and *Dickerson*, nor the advantages of strict application.

2. Limitation on Seizures

The principle of continuity also applies in the context of protracted seizures. Law enforcement authorities cannot extend detention for reasons unrelated to the underlying justification for the seizure, unless new grounds arise that independently justify continued detention.

Consider *United States v. Babwah*.[88] There, customs officers had been conducting surveillance as part of an investigation into money

83 *Id.* at 1355.
84 571 N.W.2d 612 (Neb. 1997).
85 *Id.* at 615–16.
86 *Id.* at 616.
87 *Id.* at 620.
88 972 F.2d 30 (2d Cir. 1992).

laundering. They followed suspects to a bank and then later stopped their car when it appeared they were heading for the airport with luggage in tow. The court found that this initial stop was valid, for they had reasonable grounds to believe that the luggage contained currency connected to the money laundering investigation.[89] After they searched the luggage and found nothing incriminatory, however, the officers continued to question the passengers and directed that they accompany the officers back to the motorists' residence.[90] According to the court, the seizure should have ended once their suspicion about the luggage was satisfied. After the officers learned that their reasonable suspicion was unfounded, they should have released the suspects.[91] A seizure cannot extend beyond fulfilling the objectives legitimating the initial deprivation of freedom.[92] Continued detention is tantamount to a new seizure that can only be justified by probable cause or, in some contexts, reasonable suspicion of unlawful activity.

Consider, as well, the Fifth Circuit's decision in *Simmons v. City of Paris*.[93] There, law enforcement authorities executed a "no knock" warrant on the wrong home, briefly detaining the occupants. The inhabitants sued the officers, alleging that the officers remained in the house for five to six minutes after they realized their mistake and continued detaining the inhabitants as they looked around the premises.[94] The Fifth Circuit upheld the district court's denial of

89 *Id.* at 33.

90 *Id.* at 32.

91 *Id.* at 33. Or, for that matter, neither can law enforcement officials prolong a *Terry* stop to force the suspect to participate in a lineup at the station house. That would transform a *Terry* stop into a full-fledged arrest. Wise v. Murphy, 275 A.2d 205, 224 (D.C. 1971).

92 Similarly, courts have recognized that law enforcement authorities must return items seized during an investigation once their evidentiary utility has ceased. As the court noted in *United States v. Wilson*, 540 F.2d. 1100 (D.C. Cir. 1976),

> "[i]f the seizure is for evidentiary purposes of things innocent in themselves, as for example an identifying garment or incriminating records, the lawfulness of the seizure goes only to the question of when they should be returned; when their evidentiary utility is exhausted, the owner should have back his overcoat or his business ledger."

Id. at 1103 n.4 (quoting MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 280.3 (1975)). And, in *United States v. Chambers*, 192 F.3d 374 (3d Cir. 1999), the court stated that "[i]t is well settled that the government is permitted to seize evidence for use in investigation and trial, but that such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture." *Id.* at 376.

93 378 F.3d 476 (5th Cir. 2004).

94 *Id.* at 480.

defendants' motion for summary judgment on the ground that, once the officers realized the mistake, they had to "immediately terminate their search" and release the inhabitants.[95] The termination of the search and seizure must be "immediate." Five to six extra minutes will not do.[96]

Just as law enforcement authorities must immediately release inhabitants of a home once their mistake is known, so they presumably must release a suspect after a mistaken arrest. If law enforcement authorities arrest an individual without a warrant, they must release that individual unless they provide expeditiously for a probable cause determination by a neutral judicial official. For instance, if law enforcement officials detain a suspect on suspicion of robbery, they cannot prolong the detention after they have satisfied themselves that the robbery allegation is baseless to investigate whether the individual might be a drug dealer.

In *County of Riverside v. McLaughlin*,[97] the Supreme Court considered whether law enforcement authorities could delay bringing an arrestee before a neutral magistrate for charging. According to the Court, too much delay would violate the Fourth Amendment. The majority emphasized that "[e]xamples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."[98] Justice Scalia in dissent echoed the majority's view, stating that there is "no room for intentional delay *unrelated* to the completion of 'the administrative steps incident to arrest.'"[99] Law enforcement authorities cannot seize individuals for one purpose and then extend the seizure for an unrelated objective.[100]

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95 *Id.* at 479–80. Both the search and seizure were extended, and the Fifth Circuit did not suggest that the protracted searching should be analyzed any differently from the prolonged seizure.

96 *See also* Pray v. City of Sandusky, 49 F.3d 1154 (6th Cir. 1995) (rejecting defense of qualified immunity when law enforcement authorities allegedly failed to leave a premises four to five minutes after realizing their mistake).

97 500 U.S. 44 (1991).

98 *Id.* at 56.

99 *Id.* at 63 (Scalia, J., dissenting) (emphasis added).

100 *See also* United States v. Brigham, 382 F.3d 500, 510 (5th Cir. 2004) (en banc) (stating that, "after the computer checks came up clean, there remained no reasonable suspicion of wrongdoing by the vehicle occupants. Continued questioning thereafter unconstitutionally prolonged the detentions"); United States v. Boyce, 351 F.3d 1102 (11th Cir. 2003) (holding that an officer cannot prolong a traffic stop to permit a canine sniff or to conduct a criminal background check once the police had already decided to give a warning ticket); United States v. Townsend, 305 F.3d 537, 541 (6th Cir. 2002) (holding that a motorist cannot be detained any longer than is reasonably

As in cases challenging the scope of warrantless searches, some lower courts have desisted from the logic of *Hicks* and *Dickerson*. For instance, the Eighth Circuit in *United States v. $404,905 in U.S. Currency*[101] conceded that there had been a delay in walking a drug sniffing dog around a stopped vehicle, in that case a U-Haul trailer. The motorist had been stopped for a routine traffic offense. The court, however, refused to force law enforcement authorities to release the motorist when the underlying investigation had become complete. The court focused on the fact that the drug sniff itself was not problematic from a Fourth Amendment perspective, as the Supreme Court was later to hold in *Caballes*. It noted that, if the drug sniff had taken place contemporaneously with the writing of the ticket, then there would be no Fourth Amendment offense:

> [I]f Officer Ward had been working with a partner who carried out the canine sniff while Ward completed the traffic checks, or if [the canine] had been trained to do the sniff by himself while Ward completed those checks, the sniff would have occurred on the traffic stop side of our Fourth Amendment line.[102]

The short delay past that line was of little moment to the court. Thus, according to the court, prolonging the seizure would only infringe marginally on the liberty of motorists. Particularly given the "strong interest in interdicting the flow of illegal drugs along the nation's highways," "a two-minute canine sniff was a *de minimis* intrusion on . . . personal liberty."[103] The court simply ignored the salience of the continuity principle followed in *Hicks* and *Dickerson*, as well as in *Babwah* and *Simmons*.

The Seventh Circuit in *United States v. Childs*[104] refused to draw a line at all to limit the duration of a seizure. The en banc court termed the seizure of a motorist an arrest, and then reasoned that the only constraint on the duration of an arrest was one of general reasonable-

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necessary to issue a traffic citation unless there is reasonable suspicion of a separate offense); United States v. Chavez-Valenzuela, 268 F.3d 719, 724 (9th Cir. 2001) (holding that detention cannot be extended for reasons other than those justifying the original stop in the absence of reasonable suspicion of a separate offense); United States v. Sullivan, 138 F.3d 126, 131 (4th Cir. 1998) (holding that once the purpose justifying the stop is completed, the detention is unlawful unless there is suspicion of another crime); Karnes v. Skrutski, 62 F.3d 485, 491 (3d Cir. 1995) (holding that once the writing of a speeding citation had concluded, no further legitimate reason existed for detention).

101 182 F.3d 643 (8th Cir. 1999).

102 *Id.* at 649.

103 *Id.*

104 277 F.3d 947, 953 (7th Cir. 2002) (en banc).

ness.[105] To the court, the key factor was that, for most traffic stops, law enforcement authorities have probable cause to make the stop, and motorists can be arrested for routine offenses and even hauled off to the station for booking.[106] In that eventuality, police would have more than enough time to search the entire car for contraband, let alone undertake a dog sniff.[107] Under the court's reasoning, law enforcement authorities could require motorists stopped for routine traffic stops to wait an additional fifteen minutes, half hour, or even more than an hour to permit officers to conduct unrelated criminal investigations based on nothing more than instinct. Underlying the decision is the premise that no comparable constraints as in *Terry* apply to cabin the duration and scope of a seizure when law enforcement authorities are armed with probable cause.

The presence of probable cause by itself, however, should not be determinative. In the search context, if there is probable cause to believe that a suspect has a stolen sculpture in his apartment, police must still stop the search once the sculpture has been located as specified in the warrant. And, the Supreme Court so held in *Maryland v. Buie*.[108] As in the search context, the presence of probable cause to seize an individual should not permit law enforcement authorities to continue detention once the underlying purpose of the seizure has been satisfied. The Fifth Circuit so held in *Simmons*, reasoning that the probable (though mistaken) cause to seize the occupants did not justify prolonging the seizure by even a couple of minutes after the error was realized.[109] Indeed, the Court on several occasions has inquired as to the legitimacy of police measures such as protective searches *after* a routine traffic stop,[110] which suggests that the presence of probable cause does not remove motorists' rights to a limited stop congruent with the purpose justifying the seizure. Similarly, au-

105 *Id.* at 956.

106 *Id.* (discussing Atwater v. City of Lago Vista, 532 U.S. 318 (2001)).

107 In *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Court sanctioned warrantless police inventory searches of impounded vehicles as justified by the need of police to safeguard property, protect themselves from liability, and protect themselves from danger. *Id.* at 369. The scope of the inventory search in the case extended to everything in plain sight in the car, as well as the contents of the unlocked glove box. *Id.* at 376 n.10. Justice Powell in his concurrence noted in discussing the absence of a warrant that it is particularly important that "no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope." *Id.* at 384 (Powell, J., concurring).

108 494 U.S. 325, 333 (1990).

109 Simmons v. City of Paris, 378 F.3d 476 (5th Cir. 2004).

110 Maryland v. Wilson, 519 U.S. 408 (1997); Pennsylvania v. Mimms, 434 U.S. 106 (1977).

thorities should not use the occasion of a jaywalking violation to detain the pedestrian further to launch a drug or other investigation.

Moreover, the theoretical authority to arrest a motorist does not justify the extended detention. In *Knowles v. Iowa*,[111] for example, the Supreme Court invalidated a search of a car after a routine traffic stop. The Court stressed that, even if the same evidence could have been uncovered after an inventory search had the driver been arrested and taken to the station, the fact that the driver was not arrested was dispositive.[112] The Court assessed the validity of the search based on what the troopers did, not on what they could have done.[113] Nor could the search be justified in *Knowles* on the ground that law enforcement authorities needed to preserve evidence: "No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car."[114] The power to arrest a motorist for a routine traffic offense should not trump the continuity principle.

Some might question why the greater power to arrest should not include the lesser to detain. Indeed, if courts enforced the continuity principle, law enforcement authorities might respond by arresting all motorists committing routine traffic offenses. There are at least three considerations that would make such a scenario far-fetched. First, enforcement officials' resources are too limited to permit diverting their energies to accompany motorists back to the station house and then to fill out the necessary paperwork.[115] Second, as a strategic matter, enforcement authorities would be loathe to arrest for fear of triggering *Miranda*.[116] The Supreme Court adverted to that reality in *Berkemer v. McCarty*[117] in holding that *Miranda* does not attach upon a routine traffic stop because such seizures more closely resemble stops under *Terry* rather than a custodial arrest.[118] Officials depend heavily on questioning in attempting to determine whether the motorists stopped for a routine offense are guilty of something else. Finally, as

111 525 U.S. 113 (1998).

112 *Id.* at 117.

113 *Id.* 118.

114 *Id; see also* Illinois v. McArthur, 531 U.S. 326 (2001) (declining to assess reasonableness of search based on fact that defendant could have been arrested, but was not).

115 Some officials might arrest motorists and keep them in their squad cars, search a car completely, and release the motorist if nothing untoward was uncovered. Whether courts would permit such use of arrests is unclear, but even that law enforcement path would consume more resources.

116 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

117 468 U.S. 420 (1984).

118 *Id.* at 441–42.

will be discussed later,[119] there may well be political repercussions from arresting generally law-abiding citizens for routine traffic offenses (or jaywalking), as may have occurred in *Atwater*.[120] Thus, the presence of probable cause does not negate the *Terry* Court's stress on protections analogous to those in the Warrant Clause.

Under *Terry*, once the justification for seizures ceases, further detention violates a core precept of the Fourth Amendment. When warrants are not practical, administrative constraints become even more important to cabin the swath of the search and the duration of the seizure. The continuity requirement helps ensure that law enforcement officials cannot widen deprivations of liberty by using the occasion of a lawful detention or search to investigate other crimes. At the same time, strict application of the principle deters law enforcement authorities from detaining individuals or launching searches for pretextual reasons. The decisions in *Hicks* and *Dickerson* recognize a far more important principle than many lower courts have been willing to recognize.

II. THE CONTIUITY PRINCIPLE IN *CABALLES*, *MUEHLER*, AND *ALFORD*

A. Caballes

In *Illinois v. Caballes*,[121] Illinois State Police Trooper Daniel Gillette stopped Roy Caballes for driving seventy-one miles per hour on a portion of the interstate highway where the speed limit was sixty-five miles per hour.[122] The trooper instructed Caballes to move his car farther out of the way of traffic, asked Caballes to sit in the squad car, and informed him that he was only going to issue a warning ticket.

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119 *See infra* note 210 and accompanying text.

120 532 U.S. 318 (2001). The City of Lago Vista stood by the actions of Officer Turek, who made the arrest, even though Turek no longer works for the City of Lago Vista. Soon after the arrest, he left to work in a neighboring county. Lago Vista contended that his career change was unrelated to the *Atwater* case. Lisa Ruddy, Note, *From Seatbelts to Handcuffs: May Police Arrest for Minor Traffic Violations?*, 10 AM. U. J. GENDER SOC. POL'Y & L. 479, 484 (2002) (citing Susan Borreson, *Officer Immune from Suit for Seatbelt Arrest*, 15 TEX. LAW. 38 (1999)). There has been judicial criticism. *See* State v. Jones, 796 N.E.2d 989, 994–95 (Ohio Ct. App. 2003) (finding that the Ohio Supreme Court case relying on *Atwater* was not controlling because the appellate court predicted that the Ohio Supreme Court would interpret state constitutional protections to prohibit arrests for minor misdemeanors); State v. Brown, No. 18972, 2001 WL 1657828 (Ohio Ct. App. Dec. 29, 2001) (stating that if it were at liberty to do so it would reject the precedent from *Atwater* in the situation at hand).

121 125 S. Ct. 834 (2005).

122 *Id.* at 843 (Ginsburg, J., dissenting).

The trooper called a police dispatcher to determine whether Caballes' driver's license was valid, and to check for outstanding warrants.[123]

While waiting for results of the check, Trooper Gillette queried Caballes about his destination and his business attire. Gillette soon received word that Caballes' driver's license was valid. Trooper Gillette next requested the dispatcher to determine whether there was any criminal background information linked to the motorist. Subsequently, the trooper asked Caballes for permission to search his vehicle. Caballes refused. Trooper Gillette asked whether Caballes had ever been arrested, and Caballes answered that he had not. The dispatcher reported that Caballes had two prior arrests for distribution of marijuana. Trooper Gillette testified that he had still not completed writing the warning ticket for speeding when another police officer arrived with a drug-detection dog. The second trooper walked the drug-detection dog around Caballes' car, and the dog alerted to the trunk. The troopers searched the trunk of the car and found marijuana. Caballes was arrested and charged with one count of cannabis trafficking.[124]

At trial, Caballes moved to suppress the drug evidence found in the trunk of his car. The trial court queried whether the officers "have a right to ask for criminal history? Probably not."[125] Moreover, the court noted that writing a warning ticket should not have taken more than a minute.[126] Nonetheless, the court held that the three to six minute delay did not invalidate the seizure.[127] After a bench trial, the court found Caballes guilty.[128] Caballes appealed the trial court's decision not to suppress the evidence, and the Illinois Appellate Court affirmed. The appellate court also noted the delay from use of the drug-detection dog (though not from the background check), but held that the minute or two delay in walking the dog around the car was de minimis.[129]

The Illinois Supreme Court overturned that decision, holding that the behavior of the state troopers in expanding the scope of the traffic stop was unreasonable under the standards articulated in

123 Petition for a Writ of Certiorari app. at 2a, Illinois v. Caballes, 125 S. Ct. 834 (No. 03–923), 2003 WL 23119168.

124 *Id.* at 3a.

125 *Id.* at 23a.

126 *Id.* at 24a.

127 *Id.* at 23a.

128 *Id.* at 3a.

129 *Id.* at 17a.

Terry.[130] According to the court, the troopers had "nothing more than a vague hunch that defendant may have been involved in possible wrongdoing,"[131] and "a canine sniff was performed without 'specific and articulable facts' to support its use, unjustifiably enlarging the scope of a routine traffic stop into a drug investigation."[132] Accordingly, the court directed that the contraband be suppressed.

In reversing, the United States Supreme Court held that a dog sniff does not reveal any legitimate private information because the sniff only can indicate the presence of contraband: "Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement."[133] It further explained that a "dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment."[134] Accordingly, the Court vacated the Illinois Supreme Court's decision.

The Court, however, never discussed whether the law enforcement officers prolonged the seizure of Caballes to conduct the criminal background check and dog sniff.[135] Instead, the Court stated that

> the [state court] judges carefully reviewed the details of Officer Gillette's conversations with respondent and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur. . . . [W]e accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense.[136]

Caballes himself did not raise the protracted duration argument in his brief, suggesting only that, should his challenge to the dog sniff fail, it would be for the Illinois Supreme Court to consider whether the duration of the seizure had been impermissibly prolonged.[137]

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130 People v. Caballes, 802 N.E.2d 202, 205 (Ill. 2003), *vacated*, 125 S. Ct. 834 (2005).

131 *Id.*

132 *Id.*

133 Illinois v. Caballes, 125 S. Ct. at 838.

134 *Id.*

135 As Justice Ginsburg noted in dissent, the majority ignored as well the very thrust of *Terry*, which imposed scope limitations on all warrantless searches and seizures. *Id.* at 844–46 (Ginsburg, J., dissenting).

136 *Id.* at 837 (majority opinion).

137 Brief for the Respondent at 34 n.12, *Caballes*, 125 S. Ct. 834 (No. 03-923), 2004 WL 2097415.

The record, however, strongly suggests delay.[138] After stopping Caballes, Trooper Gillette immediately informed him that he would only receive a warning ticket. Trooper Gillette then awaited the outcome of the driver's license check to determine whether there were any outstanding warrants. But, even after finding that Caballes had a valid driver's license and that no warrants were outstanding, the investigation continued. At this point, the investigation had taken five minutes, and no reason relating to the traffic violation existed for any further continuation.

Trooper Gillette subsequently requested Caballes' criminal history from the dispatcher. While Trooper Gillette was waiting, he asked whether he could search Caballes' car. Caballes declined. Trooper Gillette then asked whether Caballes had ever been arrested. Only afterwards did Trooper Gillette begin to write the warning ticket. Before he completed the ticket, Trooper Graham arrived with the drug-detection dog, which then walked around Caballes' car, causing another short delay.[139] Although the overall delay engendered by the criminal background check, unrelated questioning, and the dog sniff may have only taken three or four minutes—the record is unclear—the fact that the seizure was prolonged is inescapable. Indeed, almost the entire duration of the encounter concerned investigating Trooper Gillette's hunch of criminal wrongdoing because the decision to write the warning ticket was made in the first minute. At a minimum, once the trooper learned that Caballes had a valid driver's license and no warrants were outstanding, the rest of the encounter, at least one-third of it, was focused on the possibility of uncovering *unrelated* criminal activity of which he had no reasonable suspicion.[140]

The trial court adverted to the delay, and noted that the warning ticket should have been completed much earlier in the encounter.[141]

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138 Caballes unquestionably was seized within the meaning of the Fourth Amendment. *See* Berkemer v. McCarty, 468 U.S. 420, 436–37 (1984) (stating that the Court has "long acknowledged that 'stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief'" (quoting Delaware v. Prouse, 440 U.S. 648, 653 (1979) (alterations in original))).

139 For the Court's description of Caballes' detention, see 125 S. Ct. at 836.

140 The United States argued in its brief in *Caballes* that, even if there had been delay, only when a search is "'conducted in an extraordinary manner,'" such as through use of deadly force, or it is effected after an unannounced entry into a home, would it become unreasonable due to the presence of probable cause for the traffic stop. Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Caballes*, 125 S. Ct. 834 (No. 03-923), 2004 WL 1530263 (quoting Whren v. United States, 517 U.S. 806, 819 (1996)).

141 Petition for a Writ of Certiorari, *supra* note 123, at 24a.

Nonetheless, for reasons not clearly articulated, the court rejected the Fourth Amendment challenge to duration. The appellate court similarly noted the delay, at least that attributable to the dog sniff but, like the Eighth Circuit's decision in *United States v. $404,905 in U.S. Currency*,[142] termed the delay de minimis.[143] The Illinois Supreme Court did not assess the duration argument directly but noted that the law enforcement officials lacked justification for "further detaining the defendant."[144] Accordingly, it is not clear what the United States Supreme Court meant by "we accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense,"[145] given that none of the state courts made such a holding explicitly, and the Illinois Supreme Court never so much as intimated that conclusion.

Indeed, the United States Supreme Court previously held that even brief detentions in the absence of reasonable suspicion are antithetical to the Fourth Amendment. For instance, the Court struck down short seizures in both *United States v. Brignoni-Ponce*[146] and *City of Indianapolis v. Edmond*[147] despite the strong law enforcement interest in corralling illegal immigration in the first case and drug use in the second. An individual's right to be free from unreasonable searches and seizures dictated that the even relatively short seizures—one minute in *Brignoni-Ponce* and up to five minutes in *Edmond*—be invalidated.

The only difference in this case is that Caballes initially was lawfully detained because Trooper Gillette clocked him exceeding the speed limit by six miles per hour. Once the justification for the seizure lapsed, however, Caballes should have been in the same situation as the defendants in *Brignoni-Ponce* and *Edmond*—no further seizure should have been permitted absent reasonable suspicion of a separate offense. The prolongation in this case exceeded the length of the entire seizure in *Brignoni-Ponce*.[148] As in *Childs*, probable cause

142 182 F.3d 643 (8th Cir. 1999).

143 Petition for a Writ of Certiorari, *supra* note 123, at 17a.

144 People v. Caballes, 802 N.E.2d 202, 205 (Ill. 2003), *vacated*, 125 S. Ct. 834.

145 *Caballes*, 125 S. Ct. at 837.

146 422 U.S. 873 (1975).

147 531 U.S. 32 (2000).

148 Although the United States in its amicus brief argued that there was no delay, Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 140, at 19–20, it had previously noted, "after the purposes of a traffic detention are fulfilled. . . . any further questioning must be consensual or justified by reasonable suspicion, because lengthening a non-consensual detention increases the 'seizure.'" Supplemental Brief for the Appellant on Rehearing En Banc at 15, United States v. Holt, 264 F.3d 1215 (10th Cir. 2001) (No. 99-7150) (en banc).

existed for the stop. Yet, as discussed before, the unexercised power to arrest does not bring with it the power to detain at will for unrelated reasons. An individual's right to be free from unreasonable searches and seizures demands that the duration of the seizure be tied to the reasons justifying the initial exercise of governmental coercion. Thus, the continuity principle should require invalidating the dog sniff of the car—once the purpose of the original seizure had been satisfied, the motorist should have been free to leave.

Despite its less than candid description of the facts, the Supreme Court articulated a test in *Caballes* that seems similar to that espoused in this Article. It stated that "[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete the mission."[149] The question is what "reasonably required" means. If it connotes a general reasonableness test to determine whether the officials acted reasonably under the circumstances, then very few constraints remain.[150] Many believed the searches in *Hicks* and *Dickerson* reasonable under the circumstances as well. And, the several minute delay in *Simmons* after the law enforcement authorities realized their mistake in detaining the occupants also could be considered reasonable. The gravamen of those decisions rather is that *no* continued searching or detention is permissible, whether it appears reasonable or not under the circumstances, after the purpose for the underlying search or seizure has been satisfied. In other words, once the objective underlying the stop has been fulfilled, continued detention must be viewed as a new seizure that can only be justified independently.

In many cases, it may not be clear whether the law enforcement authorities extended the seizure to pursue an unrelated investigation. Troopers might stall when writing a warning ticket, take extra long in discussions with dispatch, or prolong questioning concerning the identity of individuals in a car. Or, they may investigate unrelated crimes while awaiting results from a driver's license check, making it difficult to separate one investigation from another. Thus, there will be a number of cases in which courts must struggle with determining whether the purpose justifying the initial seizure had been satisfied by the time that law enforcement authorities discover the incriminating information. Courts must develop tests, based on objective evidence,

149 *Caballes*, 125 S. Ct. at 837.

150 And, some evidence of the United States Supreme Court's view on the matter can be seen by its curious statement that the Illinois courts found no delay in the case. *Id.*

to assess at what point the purpose of the original seizure had been satisfied.

For one possible approach, courts could determine whether a seizure has been improperly prolonged based on what investigative measures the law enforcement officials have in fact pursued. In other words, courts might hold that the seizure lasts too long if law enforcement authorities engage in a series of measures unrelated to the investigation justifying the initial seizure. The more unrelated investigative measures undertaken, the more likely that the duration has increased. The amount of investigative activity unrelated to the investigation justifying the search or seizure may stand as a proxy for duration in those cases in which the record is not clear.

Of course, if the authorities had been driving with a drug sniffing canine in *Caballes*, no delay would have existed, and the sniff would have been entirely appropriate.[151] Similarly, law enforcement authorities might have the incentive to develop electronic drug sniffing censors, which would be unproblematic from a continuity perspective. Those consequences may not be as anomalous as they may seem. The continuity principle does not immunize motorists from dog sniffs, background checks, or questioning; it rather requires only that the seizure not be extended to pursue unrelated investigations. The strict restrictions on the duration of a seizure and the scope of a search reflect a critical strategy to cabin searches and seizures, particularly those that are not preceded by a warrant. Warrantless encounters with police increase the risk of misconduct, and the continuity requirement mimics the protections of the Warrant Clause.

Moreover, even though the linedrawing between purposes related and unrelated to the initial stop may seem to some arbitrary, sound considerations of policy support confining a seizure during a routine traffic stop to the time necessary to investigate the underlying offense. Circumscribing the seizures to the underlying objectives will blunt law enforcement officials' incentive to make the original stop

151 I do not contend that the continuity principle should block all law enforcement measures not linked to underlying justifications. I would permit law enforcement officials to ask questions unrelated to the reason for the stop as long as the duration is not extended. Authorities can ask questions of anyone on the street so to cabin authorities by preventing them from conducting any unrelated law enforcement inquiries during the stop seems excessive. *See* Muehler v. Mena, 125 S. Ct. 1465 (2005) (holding that unrelated questioning does not violate the Fourth Amendment). For insightful commentaries calling for greater restraints, see Wayne K. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004); Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117 (2001).

because the collateral purpose—investigating for a second, unrelated offense—will become more difficult. Traffic laws are comprehensive in their scope, and it is virtually impossible for drivers to travel any length of distance without violating one of the "multitude of applicable traffic and equipment regulations."[152] Law enforcement officials make millions of such stops nationwide each month.[153]

Accordingly, law enforcement authorities use minor traffic violations to pull an individual over to see if they can find other evidence of a crime, even when the officer has no articulable reason for believing the individual guilty of anything other than the minor traffic violation. Indeed, law enforcement officials are unabashedly unapologetic for using such strategies to combat transportation of illegal drugs and other contraband.[154] In some cases, as in *Caballes*, the officers' instinct reaps law enforcement dividends. In millions of others, however, the hunches have not paid off.

For instance, consider the facts in *Chavez v. Illinois State Police*.[155] There, a motorist involved in another case, *People v. Koutsakis*,[156] hired Peso Chavez to recreate the circumstances leading to the motorist's arrest and charge.[157] Chavez, who is Hispanic, proceeded on Interstate 80 with a member of the Public Defender's Office in a car behind. At mile post fifty-three, Chavez passed Trooper Larry Thomas who then proceeded to follow Chavez for twenty-four miles, both behind and next to him, and then finally stopped him allegedly because Chavez failed to signal a lane change (although Chavez and the member of the Public Defender's Office testified to the contrary).[158] Trooper Thomas was then joined by the same Trooper Gillette as in *Caballes*. They conducted a criminal background check, as in *Caballes*, questioned Chavez about his itinerary, asked for permission to search his car and, when Chavez refused, they detained him further to per-

152 Delaware v. Prouse, 440 U.S. 648, 661 (1979).

153 In Maryland alone, for instance, there are a million such traffic stops each year. Maryland v. Wilson, 519 U.S. 408, 418 (1997).

154 *See, e.g.*, DEA, Operations Pipeline and Convoy, http://www.usdoj.gov/dea/programs/pipecon.htm (last visited Aug. 8, 2005). In Illinois, the Illinois State Police launched Operation Valkyrie to interdict drugs through enforcement of routine highway safety regulations. *See* Chavez v. Illinois State Police, 251 F.3d 612, 621–22 (7th Cir. 2001) (discussing the history of the program); *see also* People v. Brownlee, 713 N.E.2d 556, 559 (Ill. 1999) (concerning an officer who admitted that he had never pulled over a driver for failing to signal within 100 feet of changing lanes but decided to do so to "see if something would come of it").

155 251 F.3d at 623–24.

156 649 N.E.2d 605 (Ill. App. Ct. 1995).

157 *Chavez*, 251 F.3d at 623.

158 *Id.* at 623.

mit Trooper Graham (also involved in *Caballes*) to arrive with his police dog.[159] Graham testified that the dog alerted, and the troopers thereafter conducted a full search of the car, finding nothing. Chavez ultimately was released, and the field report listed Chavez as "white."[160]

Few such cases wind up in court, yet, as a result, (disproportionately minority)[161] motorists are subject to delay and embarrassment, likely leaving them even more mistrustful of law enforcement authorities.[162] If the Court does not confine minor traffic violations to the purpose of the stop, then law enforcement authorities can exercise unbridled discretion in determining whom to stop, and how long to detain such individuals to permit them time to follow through their hunches. Just as with the general searches for customs violations at the time of the Framing, permitting officials to extend *Terry* stops to investigate unrelated crimes provides too much license for law enforcement officials. The issue should not be whether three (or four or five) minutes of extra detention is too much—*any* extra detention is unreasonable if the purposes animating the lawful stop have already been satisfied. The continuity requirement demands a cutoff point tied to the purpose justifying the initial deprivation of privacy.

B. Muehler

Decided several months after *Caballes*, the Court in *Muehler v. Mena*[163] confronted a fact pattern suggesting that a lawful detention had been prolonged for unknown reasons. Law enforcement authorities traced a gang member suspected of a driveby shooting to a particular residence and obtained a warrant to search the residence for evidence of the shooting and gang membership. In light of the potential danger raised, a SWAT team arrived early one morning to execute the warrant. Enforcement officials found Iris Mena asleep in a locked bedroom in what appeared to be a rooming house. At gunpoint, the officers placed her and subsequently three others in handcuffs, even though none of the four was a suspect. The authorities led the four into a converted garage, where they remained handcuffed for over

159 *Id.* at 624.

160 *Id.*

161 Cedric Herring, *Racial Profiling and Illinois Policy*, POL'Y F. (Inst. of Gov't & Pub. Affairs, Univ. of Ill., Urbana, Ill.), Vol. 14, No. 1, 2000, at 3, *available at* http://www.igpa.uiuc.edu/publications/policyforum/pf14-1_racialprofiling.pdf.

162 DAVID A. HARRIS, PROFILES IN INJUSTICE (2002); Herring, *supra* note 161; Gary Webb, *DWB*, ESQUIRE, Apr. 1999, at 118.

163 125 S. Ct. 1465 (2005).

two hours during the search. The suspect was not found; some ammunition and gang paraphernalia were.[164]

The law enforcement authorities had notified the INS of the search given their belief that the gang was comprised principally of illegal immigrants. During the detention, an INS officer asked the detainees for their names, backgrounds, and immigration documentation. Questioning continued off and on for over two hours.[165] Mena alleged that she remained in handcuffs for at least fifteen minutes after the search ended.[166]

Mena subsequently filed a civil rights action under § 1983[167] against the officers, alleging that she was detained "for an unreasonable time and in an unreasonable manner"[168] in violation of the Fourth Amendment. The district court denied the officers' motion to dismiss on the basis of qualified immunity in part, and set the case for trial. Pursuant to a special verdict form, the jury found that the officers violated Mena's Fourth Amendment right to be free from unreasonable seizures by detaining her both with "force greater than that which was reasonable and for a longer period than that which was reasonable."[169] The jury awarded Mena $10,000 in actual damages and $20,000 in punitive damages against each officer. In denying a motion for reconsideration, the district court explained that the challenged jury instruction on prolonged detention "'merely makes clear that the authority does not persist once the search ends or becomes improper.'"[170]

The law enforcement officers appealed, and the Ninth Circuit affirmed the judgment on two bases. First, it rejected their claim of qualified immunity on the ground that it was objectively unreasonable during the more than two hour search to confine her in handcuffs in the converted garage. The court of appeals asserted that the officers should have released Mena as soon as it became clear that she posed no threat of harm. The court also held that the unrelated questioning into immigration violations constituted a distinct violation, and that both violations were clearly established at the time of the incident.[171]

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164 *Id.* at 1468–69.

165 *Id.* at 1468, 1471.

166 Brief for the Respondent at i, *Muehler*, 125 S. Ct. 1465 (No. 03-1423), 2004 WL 2542382.

167 42 U.S.C. § 1983 (2000).

168 *Muehler*, 125 S. Ct. at 1469 (internal quotation marks omitted).

169 *Id.*

170 Mena v. City of Simi Valley, 332 F.3d 1255, 1268 (9th Cir. 2003), *vacated sub nom.* 125 S. Ct. 1465 (2005).

171 *Id.* at 1263–64.

The Supreme Court reversed on the merits, finding that no Fourth Amendment violation had occurred.[172] The Court reasoned that, under longstanding precedents, law enforcement authorities have the right to detain all occupants of a premises during a search, irrespective of whether the occupants are suspected of foul play. The right to detain, according to the court, is categorical.[173] Moreover, the Court found nothing unreasonable in the officers' decision to keep Mena and the others in handcuffs for over two hours given the potential safety risk posed.[174] And, as in *Caballes*, the Court "rejected the notion that 'the shift in purpose'" of a detention was, by itself, unreasonable.[175] Therefore, the Court disagreed with the Ninth Circuit's conclusion that the questioning about immigration status in any way violated the Fourth Amendment.

Unlike in *Caballes*, the Court recognized that the plaintiff had also alleged that the officers prolonged the detention past the time needed to search the premises. Indeed, Mena's first issue presented to the Court addressed "[w]hether the jury and district court erred by finding that petitioners violated the Fourth Amendment where the trial record shows that petitioners, inter alia, detained respondent for at least 15 minutes after the search ended."[176] The Court, however, as it had in *Caballes*, declined to reach the issue "[b]ecause the Court of Appeals did not address this contention."[177] Thus, even though Mena raised the prolongation issue at trial and the jury returned a special verdict on that very issue, the Supreme Court ducked the same claim it had skirted in *Caballes*.

Given the jury's verdict, the prolongation claim seems straightforward. Once the jury determined that Mena was detained "for a longer period than that which was reasonable,"[178] the Fourth Amendment violation follows. The question should not be, as Justice Stevens suggested in *Caballes*, whether the detention in general was reasonable.[179] The question should be whether the law enforcement officers continued to hold Mena once the objective justifying the detention had ceased. And, the jury apparently had already made the requisite finding of fact.

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172 *Muehler*, 125 S. Ct. at 1468.

173 *Id.* 1469–70.

174 *Id.* at 1471.

175 *Id.*

176 Brief for the Respondent, *supra* note 166, at i.

177 *Muehler*, 125 S. Ct. at 1472.

178 *Id.* at 1469.

179 Illinois v. Caballes, 125 S. Ct. 834, 837 (2005).

The risk of administrative abuse in *Muehler* is not as great as in *Caballes*. Law enforcement authorities do not routinely procure search warrants for the collateral purpose of questioning occupants of a dwelling who are not the target of the search, or for the purpose of subjecting them to indignities. Moreover, authorities should have had plenty of time to finish questioning Mena during the (perhaps too) lengthy search of the premises. A protracted detention of Mena seems, at least in hindsight, as unneeded as it was unwarranted.

Nonetheless, the continuity principle in *Muehler* is critical to circumscribe the discretion of law enforcement officials. Such officials have the authority to detain individuals for a wide variety of reasons, whether to investigate individuals near a crime site, passengers in a car stopped for a routine violation, or whatever. The power to detain should not give authorities the power to prolong the detention to interrogate at will or just because the authorities do not like an individual's attitude. The authority to detain individuals against their will is one of the most august that governments can wield. Such deprivations should be constrained: the detention must end once the reasons justifying the detention cease.

C. Alford

In *Devenpeck v. Alford*,[180] police officer Haner passed by what appeared to be a disabled car on the side of a road. As he sought to turn around to come to the motorist's aid, he saw another car pull up behind the disabled car and flash "wig-wag" headlights—headlights equipped on police vehicles that can flash the left and right lights alternately. As Haner approached the disabled car, he saw an individual whom he later learned to be Alford return to the second car. In passing, Alford explained to Haner that the first car had a flat tire and that he had given the motorist a flashlight. Haner then turned to the stranded car, whose occupant informed him that the tire was fixed and that he thought that Alford was a cop in part because of the wig-wag lights. Haner became concerned that Alford had been impersonating a cop and might be preying on stranded motorists. He called his supervisor, Devenpeck, who agreed that he should follow and detain the second car. Devenpeck agreed to join the chase.[181]

Haner thereupon drove off after Alford, eventually signaling him to pull over. Justification presumably lay in the reasonable suspicion that the driver had been impersonating a police officer. After the stop, the officer observed that the driver, Alford, was listening to the

180 125 S. Ct. 588 (2005).

181 *Id.* at 591.

police frequency on a special radio, and that a hand-held police scanner and a pair of handcuffs were in the car. The officer became more suspicious that Alford had been impersonating a police officer and began to question him. Alford informed Haner that he had worked previously for the state patrol and then claimed instead to have worked in law enforcement out of state. He explained that the flashing headlights were part of a recently installed car-alarm system. Alford asserted that he did not know how to activate the lights, but Haner noted one button on the steering wheel that he suspected activated the lights.[182]

Devenpeck then arrived, discussed the situation with Haner, and inquired of Alford about the lights. Devenpeck noted a tape recorder on the passenger seat beside Alford with the play and record buttons depressed. He directed Haner to remove Alford from the car, played the tape, and confirmed that Alford had been recording his conversations with the officers. Alford responded that he was carrying a state court of appeals decision that authorized tape recording of roadside conversations with police officers. Devenpeck nonetheless informed Alford that he was being arrested for violating the Washington Privacy Act. Officers later booked Alford for violating the Act and gave him a ticket for the illegal flashing headlights. The state trial court subsequently dismissed both charges.[183]

Alford filed suit against the officers, principally alleging that he had been arrested without probable cause in violation of the Fourth and Fourteenth Amendments. The jury returned a unanimous verdict in favor of the officers.[184] A divided panel of the Ninth Circuit reversed, finding no evidence to support the jury's verdict.[185] Because the tape recording was not a crime in Washington, the panel concluded that the arrest had been groundless and therefore in violation of the Fourth Amendment.[186] The panel acknowledged that the officers might have had reason to arrest Alford for impersonating a police officer but held that such an offense was neither articulated at the time of the arrest nor "closely related" to the privacy offense that was stated at the time of the arrest.[187] The Ninth Circuit relied on its prior decision holding that an arrest for an unlawful reason could

182 *Id.*

183 *Id.* at 591–92.

184 *Id.* at 593.

185 Alford v. Haner, 333 F.3d 972 (9th Cir. 2003), *rev'd sub nom.* Devenpeck v. Alford, 125 S. Ct. 588.

186 *Id.* at 978.

187 *Id.*

only be saved if probable cause existed for a closely related offense.[188] The panel further rejected the officers' qualified immunity defense, concluding that a reasonable officer should have known that probable cause did not exist for the arrest, based on the clarity of the Washington Privacy Act.[189]

The Supreme Court reversed. The Court explained that the critical question was whether the police officers had probable cause to believe that a criminal offense had been or was about to be committed.[190] Eschewing a subjective text, the Court stated that the actual (and not just the articulated) reasons why the officers arrested Alford were irrelevant as long as reasonable grounds for the arrest in fact existed.[191] To the Court, the impersonation issue provided all of the reason necessary to satisfy probable cause for the arrest. In other words, there is no Fourth Amendment right, in the Court's view, to be informed of the reason for one's arrest. And, no separate interest is violated when authorities articulate an illegitimate reason for an arrest, as long as there were in fact legitimate grounds upon which to base the arrest.

The Court next turned to the closely related offense requirement, as expounded by the Ninth Circuit and others.[192] The Ninth Circuit had held that no Fourth Amendment violation flowed from an invalid arrest as long as the grounds that justified the arrest were closely related to the actual reasons given by the officer.[193] If there is a sufficient nexus between the two offenses, the chance that the original arrest was a sham is low. In *Alford* the connection between the impersonation and privacy act offenses was attenuated at best. The closely related offense requirement at first glance seems to mirror the continuity principle in that it protects law enforcement officials only when there is little danger that the arrest was pretextual.[194]

The Court acknowledged that the closely related test was designed to prevent bad faith arrests.[195] As one court of appeals had explained, the test prevented officers from "justifying what from the

188 *See id.* at 976–77 (citing Gasho v. United States, 39 F.3d 1420, 1428 n.6 (9th Cir. 1994)).

189 *Id.* at 978.

190 *Devenpeck*, 125 S. Ct. at 593.

191 *Id.* at 593–94.

192 Sheehy v. Town of Plymouth, 191 F.3d 15, 20 (1st Cir. 1999); Vance v. Nunnery, 137 F.3d 270, 275 (5th Cir. 1998); Richardson v. Bonds, 860 F.2d 1427, 1430–31 (7th Cir. 1988).

193 *Alford*, 333 F.3d at 976.

194 *Devenpeck*, 125 S. Ct. at 595.

195 *Id.*

outset may have been actually sham or fraudulent arrests on the basis of ex post facto justifications that turn out to be valid."[196] Nonetheless, the Court found that the closely related test provided inadequate guidance to police officers who needed to make on the spot decisions as to whether to arrest specific individuals.

The difficulty, as the Court pointed out, is that there are many contexts in which arrests are made without resort to warrants. Police officers may have witnessed a range of conduct and learned of other acts that give rise to probable cause. On the spot, they may not be able to untangle the reasons to justify an arrest as a prosecutor might after the fact. Indeed, there is no requirement that the officials articulate the reasons until the probable cause hearing scheduled soon after, as required in the Court's *County of Riverside* decision.[197] The Court explained that the "closely related" test is "condemned by its perverse consequences. While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required."[198] In essence, therefore, unlike in the warrant or *Chenery* contexts, there is no record requirement. Police officers do not have the luxury of sifting through the evidence to determine whether probable cause exists to make an arrest. In the face of the need to make a split-second decision, reflection and deliberation are not options.[199] Had officers stopped Caballes because of an overly tinted windshield, the stop would not have violated the Fourth Amendment if the officers had made an unreasonable determination about the windshield, as long as they had reasonable grounds to stop him for speeding.

Sufficient protection for the individual arguably exists in the fact that the reasons supporting arrest must be apparent to an officer *before* the arrest. Otherwise, troopers could stop suspicious looking motorists, arrest them on trumped up charges, and then search their cars. If the stash found in the trunk or glove compartment could justify the groundless arrest, then police officers would have impunity to arrest

196 *Vance*, 137 F.3d at 275.

197 County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

198 *Devenpeck*, 125 S. Ct. at 595.

199 Indeed, some lower courts had previously held that, even when an invalid warrant has been issued, no constitutional violation arises if probable cause in fact existed for an arrest on other grounds. United States v. Fachini, 466 F.2d 53 (6th Cir. 1972); United States v. Wilson, 451 F.2d 209 (5th Cir. 1971). Courts, in other words, have not treated the presence of a warrant in the arrest context as a critical protection for individual liberty. A record requirement is not as important when only the identity of the suspect is in question and after-the-fact mechanisms exist to determine whether probable cause in fact existed.

any individual on a mere hunch that they could then uncover information that would justify the arrest after the fact. The need for probable cause at the outset limits the potential risk of arbitrary police conduct.

On the other hand, consider that Officers Devenpeck and Haner subjectively may have believed that Alford was not at all guilty of impersonation, and may have had no intent to arrest him for that offense. The officers would be protected from suit on the mere hap that there later turned out to be probable cause justifying the arrest.

Although in a sense the Court did not require continuity of the justification articulated by the enforcement officer for the seizure, it required continuity of the justification that in fact legitimized the seizure. Moreover, the risk of arbitrary conduct is small. Officers have limited incentive to arrest an individual on a trumped up charge on the mere chance that probable cause for arresting the individual on another ground exists.[200] The same danger of overreaching does not exist as it does in the *Caballes* context, in which law enforcement authorities have substantial incentive to stop motorists when probable cause of some technical violation exists on the off chance that the motorists are carrying contraband.[201] Even in the *Muehler* context, authorities have the incentive to prolong the detention to engage in additional questioning or searching.

If an objective test governs, the question should be whether probable cause is satisfied by the information known to the police officer. In *Alford*, Devenpeck knew enough information to justify the arrest on the impersonation charge. He knew about the wig-wag lights from Haner, knew that Alford had denied knowing how to use them, and saw that Alford had both a police scanner and handcuffs in the car. So, even though the tape recording triggered the arrest, the circumstances at the time would have justified an arrest on the impersonation offense. Devenpeck did not have time to reflect clearly on whether the impersonation or the apparent privacy act violation more clearly justified the arrest.[202]

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200 As Professor LaFave has noted, there is no reason to "assume[ ] [that] police will conduct searches on grounds they know or suspect to be insufficient in the hope that their actions will later be upheld on some other grounds of which they are presently unaware." 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1(d), at 114 (4th ed. 2004).

201 In assessing the legality of searches, the Court in the past at times has supported its decision by noting the lack of incentive for officers to abuse their authority. *See, e.g., infra* notes 207–13 and accompanying text.

202 Consider, however, if a third police officer had stopped Alford for speeding. If Alford had been arrested for taping the conversation, then the existence of probable

Viewed in this light, *Alford* is consistent with the continuity requirement. There was probable cause to arrest Alford. Although police officers are not estopped from justifying arrests after the fact on grounds unexpressed at the time of the arrest, they must be able to point to historical information to justify the arrests. They cannot undertake a search or seizure other than for reasons that pre-existed the encounter.[203] Unlike in *Caballes*, they cannot transform a search or seizure for one purpose into another in which probable cause (or, at times, reasonable suspicion) is *not* present. Thus, despite the surface similarity to the continuity principle raised in *Caballes* and *Muehler*, the context in *Alford* does not raise the same danger of law enforcement overreaching.

Recognizing the continuity principle is critical to cabining the discretion of law enforcement officials. Officials cannot broaden a search or lengthen a seizure to undertake an unrelated investigation. Routine traffic stops should not be the occasion for protracted questioning and other investigative steps in order to conduct a drug search, a search for item *A* should not be parlayed into a fishing expedition for item *B* or *C*, and a legitimate effort to arrest a suspect in his or her home should not provide justification for a full scale search of the premises. The continuity principle reflects the long-held fear that governmental officials may be tempted to expand searches and seizures once they are given a green light to start. The principle does not redefine the contours of a search or seizure, but rather limits the scope and duration of such encounters with law enforcement officials. The principle lies embedded in a number of Supreme Court decisions, but lower courts have at times ignored its reach.

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cause to justify arrest on the impersonation charge would vanish. The arresting officer must have reasonable grounds to know the information justifying the arrest.

203 There is greater danger, however, when the articulated offense and that predicated by probable cause do not arise out of the same set of circumstances. For instance, consider if Devenpeck knew Alford had a reputation for impersonating officers previously and knew as well that he kept handcuffs and a scanner in the car. If Devenpeck struck up a conversation with Alford on the street whereupon Alford turned on a tape recorder leading to the arrest, the prior knowledge of facts demonstrating probable cause that Alford was guilty of impersonation arguably should not cure the Fourth Amendment defect. In that setting, it would be unreasonable to assume that the arrest was made for the impersonation offense, because a reasonable officer would not have made the arrest for the prior conduct during the encounter over the taping.

III. THE CONTINUING IMPORTANCE OF ADMINISTRATIVE RESTRAINT IN APPLYING THE FOURTH AMENDMENT

Focus on the continuity principle also sheds light on Fourth Amendment jurisprudence more generally. Fourth Amendment balancing should include more systematic consideration of whether sufficient constraints are imposed on law enforcement officials. Sound policy as well as history support that focus. Although the Court has at times adverted to this goal in cases such as *Terry*, *Hicks*, and *Dickerson*, its more recent decisions have slighted the importance of restraining the discretion of enforcement officials on the beat.[204]

Understanding the Fourth Amendment in part as a restriction on law enforcement officials' discretion dovetails with the constitutional architecture more generally. As has been oft related, the Framers created a system of checks and balances in order to minimize the threat to individual liberty. Madison in particular did not trust government leaders to represent the public interest, and so endeavored to temper their zeal through the mechanism of separated powers. Experiences under the Articles of Confederation and various state constitutions had painfully proven that such power was subject to abuse. State legislators had constructed a variety of inflationary schemes to aid debtors to the detriment of creditors both overseas and within the states. Such legislation not only led to a general decline in confidence (particularly among the monied classes), but also had led indirectly to social unrest. The requirement of bicameralism, by requiring the concurrence of two distinct Houses of Congress "must be in all cases a salutary check on the government. It doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy."[205] Similarly, in Hamilton's words, presentment of legislation to the President provides "an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good."[206] The Framers slowed the legislative process to ensure greater time for deliberation to protect individual liberty.

For a nation emerging from the controversies engendered by general warrants and writs of assistance, the Warrant Clause served much the same function as the system of separated powers. Just as the separation of powers doctrine slowed government in general, the War-

204 Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 188–89 (2004); Whren v. United States, 517 U.S. 806, 817–18 (1996).

205 THE FEDERALIST No. 62, at 333 (James Madison) (J.R. Pole ed., 2005).

206 THE FEDERALIST No. 73 (Alexander Hamilton), *supra* note 205, at 392.

rant Clause cabined the authority of individual government officials. As James Otis had argued, general warrants permitted far too much discretion in low-level officials who were apt to abuse their power, whether due to lack of judgment or personal motivations. Personal liberty would suffer. Warrants slowed down the process, forced officials to articulate their goals with specificity, and permitted ex ante oversight by a neutral judicial official. The Fourth Amendment served to protect privacy by imposing restraints on such low-level officials.[207]

As a consequence, the ambit afforded law enforcement officials should factor in the Fourth Amendment balancing. This is not to suggest that the Framers anticipated any particular test, but rather that fidelity to their concerns translates, in today's world, to focusing on the extent of authority exercised by such enforcement officials.[208] If a warrant is issued, we are protected from discretion by the record. When warrants are not practicable, the scope of the search and duration of a seizure can be limited by the continuity requirement. For warrantless searches and seizures, the constitutionality of the law enforcement measure should turn in part on the extent of discretion afforded law enforcement officials in effecting searches and seizures.[209]

Three related factors frame the inquiry. First, the more discretion possessed by the cop on the beat, the greater the potential for an incursion into privacy. The history of the Warrant Clause, if it demonstrates anything, suggests the Framers' concern with unbridled discretion wielded by low-level enforcement officials. From this vantage point, law enforcement schemes that permit officials little leeway—such as screening at airports—are less problematic than in cases such as *Caballes* in which they afford officials the discretion to determine whom to stop and what to look for.

Second, to the extent that law enforcement officials treat many individuals similarly, no one individual is singled out for differential treatment, and the individual subsequently searched will not be as stigmatized. Again, the screening at airports or the video surveillance

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207 Some commentators have similarly concluded that the Takings Clause should be understood to prevent singling out of citizens for disadvantageous treatment in regulation. Ronald Krotoszynski, Jr., *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713 (2002); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

208 *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

209 The concern for limited administrative discretion might be considered as part of the privacy interest to be balanced against the government's interest in the law enforcement measure. Similar concerns are weighed in due process balancing under *Mathews v. Eldridge*, 424 U.S. 319, 347–48 (1976).

in downtown areas presents a paradigm. To be sure, all citizens would be treated alike if similarly subject to the arbitrary exercise of power by law enforcement officials. The detainees suspected of terrorism at Guantanamo presumably felt little solace in one another's misery. But, in most contexts, when law enforcement officials treat a great number of individuals similarly, we are not as concerned that enforcement officials will proceed in an arbitrary manner. When officials rely on instinct in deciding whom to search and what to seize, the potential for invidious conduct increases.

Third, the more that the political process is open to challenge the law enforcement measure, the less the concern for the absence of a warrant.[210] The political process can serve as a check either before or after the law enforcement measure is undertaken. Police departments—like agencies generally—formulate policies of broad application only after considerable debate and input from different levels within the department itself. The presence of prior deliberation and the knowledge of widespread application serve as some check on arbitrary action. The likely debate prior to enactment ensures consideration of the consequences for enforcement and creation of a type of administrative record as in *Chenery*. Some law enforcement measures, of course, are better thought out than others. Yet, we routinely shield agency policymaking from second guessing in tort suits, even when evidence of significant deliberation is wanting.[211] Individuals, on the other hand, can sue for the negligence of individual government employees, because no comparable checks restrain the situation specific judgments or reactions of agents in the field. Deliberation or participation in the decisionmaking process is not possible. Officers making *Terry* stops or deciding whom to arrest make split-second decisions, and hence no process is available to check their exercise of discretion. There was no internal debate preceding the stops in *Caballes*, the con-

210 *See generally* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (arguing that much criminal procedure doctrine should be revised in light of contemporary urban realities, including minorities' gain in political power). Professors Kahan and Meares are not as concerned with the exercise of discretion per se as with whether the political process can adequately protect the interests of those burdened by the law enforcement measure.

211 Congress waived the immunity of federal agencies from tort suits under the Federal Tort Claims Act, but carved out claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (2000). For a broad description of the policymaking protected, see *United States v. Gaubert*, 499 U.S. 315, 325 (1991) (protecting actions that are "grounded in the policy of the regulatory regime" and "susceptible to policy analysis").

tinued detention in *Muehler*, and the arrest in *Alford*, but there has been before establishing systems of video surveillance in streets[212] and before establishing screening in airports.[213]

Moreover, when a search is targeted at citizens generally or at least at a broad group, the political process is open to curb any law enforcement excesses after the fact. Those affected are more readily identifiable and can therefore band together to use the political process to protest any overly invasive measure. Aggrieved citizens can change the measure through the political process unless those targeted are felons or undocumented aliens.[214] By contrast, searches and seizures by law enforcement officials on the beat generally affect only one individual at a time. In such cases, it is more difficult to predict who will be adversely impacted from such singling out, and those affected will have great difficulty forming coalitions to oppose the law enforcement activity due to the lack of identifiability. Citizens may understand that they might in the future be singled out, but that very uncertainty undermines their incentive to fight the measure. Examining these three related factors—the discretion permitted low-level officials, whether individuals are treated similarly, and the availability of the political process as a check—suggests that the Supreme Court has both underprotected and overprotected privacy under the Fourth Amendment.

Consider, first, a hypothetical statute that every factory is to be inspected each Tuesday from 1:00 p.m. to 2:00 p.m. to determine compliance with OSHA. Little discretion would be left in the enforcement officer. Factory managers would know that all similarly situated

212 Quentin Burrows, Note, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1080–81 (1997).

213 For a recent legislative initiative in the area, see Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.). For a discussion of its enactment, see Tara Branum and Susanna Dokupil, *Security Takeovers and Bailouts: Aviation and the Return of Big Government*, 6 TEX. REV. L. & POL. 431, 457–59 (2002).

214 Of course, if they are felons, they have less political power. Few legislators lose votes if they are insensitive to the needs of felons. *See generally* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993) (using public choice theory to argue that legislators ignore criminals' rights as a matter of political expediency); Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2168–69 (1996) (noting that felons often lack the money and status to influence politicians, and may even lack the right to vote). Moreover, if law enforcement officials target undocumented aliens in particular, they are unlikely to have any pull within the political process to curb the zeal of enforcement officials.

entities would be subject to an identical search, and they would have little reason to worry that an official was picking on the particular factory owner merely because of race, political views, personal animosity, or whatever.[215] If the administrative rule required officials to select randomly one out of each ten factories to search, only modest discretion would exist. Furthermore, if the factory owners object that the search is too intrusive or unneeded, they can likely resort to the political process in an effort to minimize the impact of the search rule.[216]

This is not to suggest that Congress or an administrative agency can legislate away all privacy interests. In the above example, a rule that each factory's premises must be open for inspection twenty-four hours a day with no notice would strike most as violative of the Fourth Amendment irrespective of the fact that all factories would be treated alike. Nonetheless, a legislative or administrative rule can mute concerns for the exercise of unbridled discretion by street-level officials. In essence, the legislative act can take part of the place of a warrant by specifying the timing and scope of such searches—the political process is then more open for all to voice their complaints, particularly if average citizens are affected.

The security checkpoints at airports pose another helpful example. The discretion of TSA officials is bounded—everyone must pass through security, and the news reports that dignitaries such as Senator Kennedy have been subject to exacting searches reinforce the democratic nature of the searches.[217] There is still a risk that Congress could legislate away our privacy rights as some have argued with the Patriot Act,[218] but there is less concern when the law enforcement measure affects the whole country roughly in the same manner and redress can be obtained through the political process.

The Supreme Court's decision in *Michigan Department of State Police v. Sitz*[219] reflects that perspective. There, Michigan had created a sobriety checkpoint. All drivers were checked for obvious signs of in-

215 *Cf.* Camara v. Mun. Court, 387 U.S. 523 (1967) (addressing permissible ambit of administrative searches).

216 If there were only one or two factories in the country affected, resort to the political process most likely would be blocked.

217 *Kennedy Ensnared by Terrorism No Fly List*, THE FRONTRUNNER, Aug. 20, 2004 *at* LEXIS, News Library, Wires File; *see also* Editorial, *Glitches in the No Fly List*, CHATTANOOGA TIMES FREE PRESS, Aug. 25, 2004, at B8 (stating that U.S. Representative John Lewis from Atlanta is also on the list); Denise Marois, *Measure Would Create Appeals Process for No-Fly List*, AVIATION DAILY, Oct. 1, 2004, at 5 (noting that U.S. Representative Don Young of Alaska has also been stopped because his name is on the no fly list).

218 *See* Erwin Chemerinsky, *Losing Liberties: Applying a Foreign Intelligence Model to Domestic Law Enforcement*, 51 UCLA L. REV. 1619 (2004).

219 496 U.S. 444 (1990).

toxication, and the average checkpoint stop lasted for about twenty-five seconds.[220] The administrative rule, in the words of Chief Justice Rehnquist, served to "minimize the discretion of the officers on the scene."[221] Moreover, the privacy invasion may be less, the Court continued, because all drivers were treated the same.[222] Similarly, a court of appeals upheld a roadblock on a military base that had been set up to require identification of drivers.[223] The purposes of the checkpoint system were to make individuals on the base aware of security procedures and to protect the base itself. The court stated that "'[r]oadblock seizures are consistent with the Fourth Amendment if they are carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.'"[224] Given that

> the checkpoint stopped every sixth vehicle . . . counters any suggestion of subjective intrusion because it might dispel any concern of a law-abiding motorist that she had been singled out. There is no evidence that [the driver] was singled out or treated arbitrarily or that the officers were operating with unfettered discretion as to which cars to stop.[225]

Accordingly, the court upheld the seizure.[226]

Indeed, oversight of such checkpoints via the political process is possible. Citizens have protested against law enforcement use of checkpoints in a variety of contexts. In a recent election for the mayor of Montgomery, Alabama, for instance, opponents and the press criticized the city administration for establishing checkpoints around the Montgomery Mall,[227] and citizens in Indianapolis protested about checkpoints established to determine compliance with seatbelt laws.[228] Hearings on airport safety have been widely publicized. At times, legislators have advanced the cause of citizens and

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220 *Id.* at 447–48.

221 *Id.* at 452.

222 *Id.* at 453. The Court reiterated in *United States v. Ortiz*, 422 U.S. 891, 894–95 (1975), that roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorists can see that other vehicles are being stopped, they can see visible signs of the officers' authority, and they are much less likely to be frightened or annoyed by the intrusion.

223 United States v. Green, 293 F.3d 855 (5th Cir. 2002).

224 *Id.* at 859–60 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 49 (2002) (Rehnquist, C.J., dissenting) (internal citations omitted)).

225 *Id.* at 860.

226 *Id.* at 862.

227 William F. West, *Candidate Bright Answers Critics*, MONTGOMERY ADVERTISER, Aug. 6, 2003, at A1.

228 Chuck Avery, *Angry Consumers Need Outlet*, PALLADIUM-ITEM (Richmond, Ind.), Oct. 28, 2002, at 6A.

sought to alter law enforcement practice. Congressman Darrell Issa, a member of the House Subcommittee on Immigration, Border Security and Claims, tried to close immigration checkpoints in his district because they tied up traffic and because the funds used could be "rerouted to more effective use."[229] The political process serves as a safety valve to vent concerns about checkpoints. Individuals affected can band together to gain redress through the political process.

The political process, however, is not sufficient in and of itself to protect completely against overreaching at checkpoints. Each stop at a checkpoint may only take three to five minutes, so that motorists may not have the incentive to overcome free rider problems to organize against needless stops. The only citizens injured sufficiently to mount a challenge are those caught with contraband. Moreover, for checkpoints near the border or in areas populated by the poor, access to the political process may be blocked. And, unlike in the era of the Framing, the current generation of smugglers lacks influence in the political process. The judicial forum should still be open to air Fourth Amendment challenges, but when the law enforcement measures do not permit singling out and affect a great number of individuals, there should be less concern for the legality of the law enforcement measure.[230]

Compare the above cases to *Delaware v. Prouse*[231] in which the Court invalidated the stop of a motorist that was aimed at checking for driver's license and registration materials. The Court stated that vest-

229 Leonel Sanchez, *Issa Meets Checkpoint Supporters*, SAN DIEGO UNION-TRIB., Aug. 2, 2002, at B3.

230 Consider, as well, that several law enforcement agencies in the United States have established DNA dragnets to investigate particularly heinous crimes. For instance, when investigating a series of rapes, police in Ann Arbor, Michigan, obtained blood samples from 160 African American males, and law enforcement authorities in San Diego earlier tested approximately 800 African American males in seeking a serial killer. More recently, police in Miami tested over 2000 individuals in investigating serial murders, and police in Truro, Massachusetts, have sought to test every male resident in the town. Amanda Ripley, *The DNA Dragnet: To Find a Killer a Town Asks All Its Men To Give a Sample. Savvy Policing or Invasion of Privacy?*, TIME, Jan. 24, 2005, at 39. The very breadth of the searches precipitated news coverage, see, for example, Mark Hansen, *DNA Dragnet: Critics Say Police Employed Heavy-Handed Tactics To Coerce More than 12,000 People To Give Genetic Samples in the Search for a Serial Killer*, A.B.A. J., May 2004, at 37, and raised scrutiny of the law enforcement strategy. Given the coercion inherent in many of the searches, the dragnets at times may well have violated Fourth Amendment rights. Nonetheless, the generality of searches in a sense checked some of the potential for abuse given that so many individuals were subject to indignities, and enforcement officials in both cities curtailed the scope of their investigations.

231 440 U.S. 648 (1979).

ing "unbridled discretion" in officers to stop motorists on the basis of "inarticulate hunches" could not be reasonable.[232] It further explained that "[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed."[233] The Court acknowledged that its ruling did not prevent Delaware "from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion."[234] And, in *United States v. Brignoni-Ponce*[235] the Court invalidated a roving checkpoint near the Mexican border in part because the roving patrol stops "would subject the residents of . . . [border] areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. . . . [They] could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile-border."[236] The potential targeting of motorists based on subjective criteria doomed the scheme. As the Court later summarized, "[t]here also was a grave danger that such unreviewable discretion would be abused by some officers in the field."[237] Unlike in *Caballes*, therefore, the Court at times has been sensitive to the need for administrative constraint before upholding searches and seizures.

The Court's decision in *City of Indianapolis v. Edmond*,[238] however, cannot easily be understood within the framework of *Prouse* and *Brignoni-Ponce*. There, the Court reviewed a checkpoint system that was in many ways similar to that in *Sitz* with the difference that the goal was to find not only impaired drivers, but also cars likely carrying narcotics. The stops, as in *Sitz*, were relatively short. The Court explained that, under the rules, "[t]he officers must conduct each stop in the same manner until particularized suspicion develops, and the officers have no discretion to stop any vehicle out of sequence."[239] In dissent, Chief Justice Rehnquist complained that the case was nearly on all fours with *Sitz*, and stressed that the stops were "executed in a regularized and neutral manner."[240]

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232 *Id.* at 661.

233 *Id.*

234 *Id.* at 663.

235 422 U.S. 873 (1975).

236 *Id.* at 882–83.

237 United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

238 531 U.S. 32 (2000).

239 *Id.* at 35.

240 *Id.* at 53 (Rehnquist, C.J., dissenting).

Nonetheless, the Court ruled the checkpoint unconstitutional because the principal purpose of the checkpoint was to further ordinary criminal law enforcement objectives.[241] Unlike in *Sitz*, the regulatory interest sought did not predominate. To the Court, therefore, the checkpoint was very similar to any routine stop of a traveler, which has to be preceded by reasonable suspicion.

The check selected by the Court is to insist that any law enforcement search or seizure that circumvents the warrant requirement be structured in a way that does not look like routine criminal law enforcement. The so-termed special needs exceptions validate warrantless searches and seizures as long as the government can point to needs divorced from the general needs of criminal law enforcement, whether protecting our borders,[242] investigating accidents,[243] or maintaining discipline in the schools.[244]

But, the Court in *Edmond* gave short shrift to the administrative constraints inherent in the particular checkpoint scheme. First, the law enforcement officials did not have the discretion to detain any motorist beyond two minutes or so unless particularized suspicion of wrongdoing developed. Second, each motorist was treated alike, and so there was little if any danger of singling out motorists on the basis of ethnicity, looks, or type of car. Third, the very breadth of the checkpoints suggests that there was considerable debate about the propriety of their establishment prior to deployment. If the citizens of Indianapolis had been outraged at the delays, they could have banded together to make their voice heard in the legislative or administrative process to demand that the checkpoints be altered or discontinued,[245] much as some citizens attempted in challenging the seatbelt checkpoints.[246] To be sure, if the checkpoints were only erected in particular parts of town, then there would be greater risk of targeting groups that lacked power in the political process for adverse treat-

241 *Id.* at 48 (majority opinion).

242 United States v. Flores-Montano, 541 U.S. 149 (2004).

243 Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (finding drug and alcohol testing for railway employees involved in train accidents reasonable under Fourth Amendment); Michigan v. Tyler, 436 U.S. 499, 510 (1978) (holding that firefighters could collect evidence of arson without warrant immediately after extinguishing fire).

244 New Jersey v. T.L.O., 469 U.S. 325 (1985).

245 *See also* Edmond v. Goldsmith, 183 F.3d 659, 671 (7th Cir. 1999) (Easterbrook, J., dissenting) (suggesting in the appellate court that local governments should have leeway to adopt varying law enforcement techniques because citizens can refuse to reelect the politicians who put the roadblocks in place).

246 *See supra* note 228 and accompanying text.

ment. On the record, we do not know the process by which the police department reached the decision where to establish the checkpoints.

My point is not that the discretion exercised by lower level officials should be dispositive. But it is not clear, a priori, whether the check of a noncriminal law enforcement purpose[247] is more critical in the long run than ensuring that officials have limited latitude in conducting searches and seizures. The lessons from history suggest that a critical threat to liberty stems from the excessive discretion vested in low-level enforcement officials.

Finally, a similar issue of administrative constraint underlay the public housing sweeps cases. On the one hand, to the extent housing regulations vest discretion in officials to search public housing units at will, the specter of arbitrary actions looms high. Officials can choose which units to search and at what time. On the other hand, if every unit is subject to a search, or the units are selected randomly, then there is less risk of abuse. Moreover, given the large number of residents affected, the political process will be open for complaints, and complaints there have been.[248] And, if the residents support the sweeps, as they did in some areas,[249] that would provide greater assurance of prior deliberation, and greater likelihood of continuing oversight.[250] The protection of generality and evidence of deliberation do not remove all Fourth Amendment concerns, but they should limit the threat to privacy under the Court's balancing framework.

Renewed focus on the risk that cops on the beat at times exercise excessive discretion can help reorient Fourth Amendment analysis generally. When law enforcement officials are checked by departmental rules and the prospect of political oversight, there is less reason to worry about overreaching. Courts may have scrutinized seizures in *Edmond* and the housing sweeps cases too stringently. On the other

247 Indeed, the Court in other cases has manifested its impatience with any doctrine that turns on the subjective purpose for which an investigation was launched. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996).

248 Pratt v. Chi. Hous. Auth., 848 F. Supp. 792 (N.D. Ill. 1994); Zionne Pressely, *Privacy or Safety: A Constitutional Analysis of Public Housing Sweep Searches*, 6 B.U. PUB. INT. L. J. 777 (1997).

249 *Pratt*, 848 F. Supp. at 796–97. That very burdening may minimize concern for privacy violations. Kahan & Meares, *supra* note 210.

250 The Clinton Administration established guidelines to provide public housing authorities with the tools to keep order in the projects, assuring greater visibility for the issue. *See* Letter from Janet Reno, Attorney Gen., and Henry Cisneros, Sec'y of Housing and Urban Dev., to William Jefferson Clinton, President of the United States (Apr. 14, 1994), *reprinted in* 140 CONG. REC. 8299 (1994). The guidelines specify in part that the sweeps should be undertaken on a regularized basis and advance notice given.

hand, when the danger of singling out exists and the political process is closed to the individuals affected, courts should be much more demanding before upholding the contested measure. The decisions in *Caballes*, *Muehler*, *Childs*, *Custer*, and *Wonders* reflect the danger of permitting officials the almost unfettered discretion to stop whomever they wish and detain for however long they want. The Fourth Amendment demands greater restraint.

CONCLUSION

The Supreme Court's recent decisions in *Caballes*, *Muehler*, and *Alford* bring to the fore a long simmering issue in Fourth Amendment jurisprudence—to what extent should the risk of arbitrary conduct by law enforcement officials weigh against the constitutionality of warrantless searches and seizures. The continuity principle, as exemplified in *Hicks* and *Dickerson*, restrains law enforcement officials by mandating that searches and seizures be cabined by the objectives justifying their initiation. Searches and seizures cannot be continued once the underlying purposes have been satisfied. The Supreme Court should have relied on the continuity principle in resolving the Fourth Amendment challenges in *Caballes* and *Muehler*. The risk that law enforcement officials will stop motorists on the off chance that such encounters will yield incriminating information is substantial, and officials in the past have stopped motorists based on criteria that most of us find quite troubling. Moreover, there is little reason to countenance detention of an occupant of a dwelling after a two-to-three hour search of the premises has been completed.

More broadly, the legitimacy of searches and seizures should turn in part on whether excessive discretion is vested in law enforcement officials. When individuals are treated alike as with video surveillance, and when the investigative measures are preceded by deliberation, there is less likelihood for misconduct. Far greater abuse can arise under the enforcement scheme in *Caballes* than under the checkpoint operation in *Edmond*. The history of the Warrant Clause reinforces that all of us are protected when agents of the state proceed under clear guidelines.